TREATISE

ON

COURTS MARTIAL.

ALSO

AN ESSAY

ON

MILITARY PUNISHMENTS AND REWARDS.

BY

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TO HIS EXCELLENCY

THE HONOURABLE

THOMAS GAGE,

GENERAL AND COMMANDER IN CHIEF OF ALL HIS MAJESTY'S FORCES IN NORTH AMERICA.

&c.

SIR,

I AM not to follow the beaten path of dedicators. The language of adulation is not that of a soldier: and your understanding is superior to it.

The qualifications which distinguish your public and private life, are very generally known; and they have endeared you in a most particular manner to those who have had the honour to serve under you.

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A

TREATISE

ON

COURTS MARTIAL.

PART I.

Of Martial Law and Military Courts in general.

CHAPTER I.

Of the Origin and Progreſs of Martial Law in England.

THE court of chivalry or *marſhal's court, the judges of which were the lord high conſtable and earl marſhal, is the fountain of martial law in England†; but the original inſtitution of theſe officers ſeems

* *Mareſhall*, Saxon, from *marc*, a horſe, and *ſchall*, a governor

† 4 Inſtitute, 123.

not to have been exactly ascertained by our ancient historians. In the laws before the conquest, we read, observes Sir Edward Coke, *de Heretochiis* or *Heretogiis*, i. e. *ductoribus exercitus*, ab *here*, exercitus, and *tœcu* ducere, which agree with either of these great officers, *constabularius* or *marischallus**; but we find no mention of them by these titles, till they became part of the *aula regis*, a supreme court established by William the Conqueror, under the direction of a chief justiciar, and composed of the great officers of state, each of whom had his particular jurisdiction; the constable and earl marshal presiding in matters of honour and arms, and determining according to the law military, and the law of nations; and when Edward I. new-modelled the whole frame of our judicial polity, and broke and subdivided the *aula regia* into distinct courts, they were appointed to preside over the court of chivalry†.

* 4 Institute, 127.
† Blackstone's Commentaries, b. 1, p. 37, 39.

THE

THE jurisdiction of this court, according to Sir Matthew Hale*, was declared and limited by common law, as follows: First, negatively; its officers were not to meddle with any thing determinable by the common law, and therefore, inasmuch as matter of damages, and the quantity and determination thereof, is of that cognizance, the court of constable and earl marshal could not, even in such suits as were proper for their authority, give damages against the party convicted before them, and at most could only order reparation, in point of honour. Neither could they, as to the point of reparation in honour, hold plea of any such words or things wherein the party was relievable by the courts of common law.

SECONDLY, affirmatively: Their jurisdiction extended to matters of arms and matters of war, viz. as to matters of arms,

* Hale's Hist. of the Common Law, c. 2, p. 36, 37, 38.

(or heraldry) the conſtable and marſhal had cognizance, viz. touching the right of coats of armour, bearings, creſts, ſupporters, pennants, &c. and alſo touching the right of place and precedence, in caſes where either acts of parliament, or the king's patent, (he being the fountain of honour) had not already determined it; for, in ſuch caſes, they had no power to alter it. Theſe things were anciently allowed to the juriſdiction of the conſtable and marſhal, as having ſome relation to military affairs, but ſo reſtrained that they were only to determine the right, and give reparation to the party injured, in point of honour, but not to repair him in damages.

But as to matters of war, the conſtable and marſhal had a double power, viz. 1. A miniſterial power, as they were anciently two great ordinary officers in the king's army; the conſtable being in effect the king's general, and the marſhal being employed in marſhalling the king's army, and

and keeping the liſt of the officers and ſoldiers therein; and his certificate being the trial of thoſe whoſe attendance was requiſite*. 2. A judicial power, as, 1ſt, Appeals of death or murder committed beyond the ſea, according to the courſe of the civil law; 2dly, The rights of priſoners taken in war; 3dly, The offences and miſcarriages of ſoldiers, contrary to the laws and rules of the army. For always, preparatory to an actual war, the kings of this realm, by advice of the conſtable (and marſhal) were uſed to compoſe a book of *rules* and *orders*, for the due order and diſcipline of their officers and ſoldiers, together with certain penalties on the offenders, and this was called *martial law*. We have extant in the black book of the admiralty, and in other places, examples of ſuch military laws, and eſpecially that of the 9th of Richard II.† compoſed by the

* Littleton, Sect. 102.

† A curious pamphlet has lately been publiſhed, entitled,

the king, with the advice of the Duke of Lancaſter, and others.

The extent of power of this court has alſo been aſcertained and limited by different ſtatutes, particularly that of the 13th Richard II. c. 2, which paſſed upon a complaint of the commons that the court of the conſtable and marſhal had encroached to themſelves contracts, covenants, treſpaſſes, debts, and detinues, and many other actions pleadable at common law, in prejudice to the king and his courts, and to the oppreſſion of the people; and it is herein enacted, that, "*To the conſtable it appertaineth to have cognizance of all contracts and*

entitled, The Ancient Code of Military Laws, for the Government of the Engliſh Army under King Henry V. enacted in France.

Many of the regulations in this Code bear, as the author obſerves, a great ſimilarity to our modern articles of war; but he is miſtaken in ſaying that this is the moſt ancient code of military laws for the government of an Engliſh army that has been handed down to us.

deeds

deeds of arms, and of our war, out of the realm, and also of things that touch war within the realm, which cannot be determined by the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time. And by 1 Hen. IV. c. 14. it is enacted, That *all appeals of things done within the realm, shall be tried and determined by the good laws of the realm, made and used in the time of the king's noble progenitors; and that all appeals to be made of things done out of the realm, shall be tried and determined before the constable and marshal of England for the time being.*"

The post of high constable was hereditary in the line of the Bohuns, Earls of Hereford and Essex, and afterwards in that of the Staffords, and descended in right of inheritance to Edward Duke of Buckingham*; but upon his being attainted in the 13th of Henry VIII. the office be-

* 4 Inst. 125.

came forfeited to the crown, and no permanent high conftable has been fince appointed, (but only *pro hac vice*, at coronations, &c.) the authority being deemed too ample for a fubject; fo ample, that when the Chief-Juftice Fineaux was afked by Henry VIII. how far it extended, he declined anfwering, and faid, the decifion of that queftion belonged to the law of arms, and not to the law of England*.

The office of earl marfhal, which is hereditary in the Duke of Norfolk's family, ftill exifts; but upon the fuppreffion of the poft of high conftable, it was ftrongly infifted on†, and afterwards given as the opinion of a committee of the houfe of commons, appointed in the year 1639‡ to enquire into the abufes of this court, that the lord marfhal could not hold this court without the conftable, and this doc-

* Blackftone's Comment. b. 4, p. 264.
† Vide Dr. Oldis's Cafe, Parl. Cafes, 64, 66.
‡ Rufhworth's Collection, v. 2, p. 1055, 1056.

trine

trine was universally agreed to, in appeals of a capital nature*. It was notwithstanding held from time to time, during the reigns of Henry VIII. Elizabeth, and James I. by the marshal alone, with the concurrence of the judges of the common law†. It was generally confined, however, to civil causes; and although the court of chivalry has never been absolutely abolished by legal authority, yet it is almost entirely laid aside, even in civil matters, on account of the feebleness of its jurisdiction, and want of power to enforce its judgments, as it can neither fine nor imprison, not being a court of record‡.

As to the matter of contracts, all such are now cognizable in the courts of Westminster

* 1 Inst. 746. Cases in Parliament, 61. Rushworth, v. 2, p. 107. 2 Hawkins's Pleas of the Crown, p. 12, 13.

† 4 Inst. 126. Farresly's Reports, 126.

‡ Salkeld's Reports, 553. Blackstone's Comment, b. 3, p. 68,

Hall, if not directly, at least, in fiction of law: as if a contract be made at Gibralter, the plaintiff may suppose it made at Northampton; for the locality or place of making it, is of no consequence with regard to the validity of the contract*.

The office of earl marshal (as just now observed) still subsists, but his authority seems at present to be confined to the adjusting of armorial ensigns, bearings, &c. settling the rights of place and precedency; marshalling and conducting coronations, marriages, funerals, &c of the royal family; and proclaiming war and peace.

Though the authority of the court of chivalry, with regard to matters of war, &c. both within and without the realm, not determinable by common law, was first established by the common law, and afterwards confirmed by different statutes, as has already been taken notice of, and was

* Blackstone, b. 3, p. 104-5.

never

never objected to, even in criminal cases, till the post of high constable was laid aside; yet we find its jurisdiction encroached upon much earlier, for by statute of the 18 Henry VI. desertion from the king's army was made felony, and by 7 Henry VII. c. 1. and 3 Henry VIII. c. 5. benefit of clergy is taken away, and authority given to justices of the peace, to enquire thereof, and hear and determine the same. And Rapin* quotes an instance of Henry VII. having ordered those accused of holding intelligence with the enemy, after the battle of Stoke, in 1487, to be tried by commissioners of his own appointing, or by courts martial, according to the martial law, instead of the usual course of justice, which was not so favourable to his design of punishing them only by fines, and thereby filling his coffers; for in cases of this sort, the laws of England admitted of no medium between death and an absolute discharge, and the

* Tindal's translation of Rapin's Hist. of England, v. 5, p. 244.

king would have neither. This however ſeems to have been an arbitrary and illegal exertion of power in this avaricious monarch, and not authorized by any law of the land.

FROM the time of the court of chivalry being abridged of its criminal juriſdiction by the ſuppreſſion of the poſt of high conſtable, to the Revolution, there appears to have been no regular eſtabliſhed court for the adminiſtration of martial law. For although the court of chivalry ſtill continued to be held from time to time by the earl marſhal, its authority (as was before obſerved) extended only to civil matters; and notwithſtanding deſertion was by the 2d and 3d Edw. VI. c. 2. made felony without benefit of clergy, and other military crimes were made puniſhable by fines, impriſonment and loſs of ſervice; and by 39 Eliz. c. 17. idle and wandering ſoldiers and mariners were to be reputed as felons, and to ſuffer as in caſes of felonies, without benefit

of

of clergy (with ſome exceptions); and the juſtices of aſſize and goal-delivery were to hear and determine theſe offences; yet we find many inſtances, during this period of our hiſtory, of other courts being erected for the adminiſtration of martial law; and not only military perſons made ſubject to it, but many others puniſhed thereby; ſome entirely at the diſcretion of the crown, and others again by appointment of the parliament only. In the reign of Mary, a proclamation was iſſued, that whoever was poſſeſſed of heretical books, and did not preſently burn them, without reading them, or ſhewing them to others, ſhould be deemed a rebel, and executed immediately by martial law; and in the ſucceeding reign of Elizabeth, it was no leſs an object of complaint; for in caſes of inſurrection and public diſorder, it was not only exerciſed on military men, but on the people in general; and was extended alſo to thoſe who brought bulls, &c. from Rome. We read of a very extraordinary exertion of the prerogative in a matter

ter of this ſort by Queen Elizabeth, who, upon ſome diſturbances from the apprentices of London, conſtituted the lord mayor. provoſt-martial, with power to proceed againſt them according to martial law*; and it was a circumſtance of nearly a ſimilar nature, though a more flagrant breach of the laws, that occaſioned the enacting of the petition of rights in the third year of the reign of Charles I. This monarch, inheriting his father's notions of kingly power, and entertaining a contempt for the commons, endeavoured to raiſe money without their conſent; and, among other arbitrary methods which be took to effect his purpoſe, ſent commiſſioners into the different counties, to demand a certain ſum from each individual, according to his eſtate, and ſoldiers were ordered to be quartered upon the houſes of thoſe who were backward in their contributions; and if injured or inſulted by the ſoldiery, they could not appeal to the ordinary courts of juſtice, but

* Rymer's Fædera, v. 16.

were

were obliged to ſeek redreſs from a council of war, which the king had inſtituted, with power to proceed within the land againſt ſuch ſoldiers, mariners, and other diſſolute perſons joining with them, as ſhould commit murder, felony, robbery, or other outrage or miſdemeanor, as was uſed in armies in time of war, and condemn and cauſe ſuch offenders to be executed according to martial law. Finding however that theſe methods were ineffectual, he was obliged, in the end, to aſk the aſſiſtance of the commons, who on their part were become reſolutely bent on granting no ſubſidies, till the grievances which the people ſuffered were redreſſed; and Charles perceiving that money, which he could no longer do without, was to be had on no other terms, gave his aſſent at laſt to the bill prepared by the commons, called the *petition of rights*, one clauſe of which was, that the commiſſioners for proceeding by martial law ſhould be diſſolved and annulled, and no ſuch commiſſion be iſſued for the future.

THIS

THIS petition of the commons, which by the concurrence of the other branches of the legiſlature became a law, was not however ſufficient to reconcile the king and his parliament. It would be foreign to my preſent purpoſe to enter into a particular detail of the diſputes which afterwards enſued between them, and proved fatal for a time to monarchy. It is ſufficient to obſerve, that upon the different parties having recourſe to arms, they ſoon found that armies without diſcipline and military ſubordination, were like bodies without ſouls, and that theſe were only to be acquired by eſtabliſhing martial law amongſt them.

INDEED, even before they came to an open rupture, a committee of ten lords was ſent to the king to deſire that he would diſband five regiments; and his majeſty having conſented thereto, the Earl of Holland, then general of the Engliſh army, gave it as his opinion, that the army could not well be diſarmed, without ſome power to puniſh ſuch

ſuch as ſhould mutiny or refuſe to be diſbanded; and in conſequence thereof, it was agreed to propoſe a mutiny act to the commons, which was only to ſerve that particular purpoſe, and die with it, but the commons thought it better to deſire the general to execute martial law himſelf on ſuch as were refractory *.

But when matters were brought to extremity, and diſtinct armies formed under the denomination of the royal and parliamentary forces, a petition was preſented to the houſe of lords by the lord mayor, aldermen and commons of London, praying that among other regulations in the parliamentary army, there might be a new eſtabliſhment for, and ſuch a council of war, and diſcipline in the ſaid army, for the time to come, as might tend to the glory of God, the encouragement and defence of his people, procure a bleſſing thereupon, and be a pattern of reformation to all the reſt of the

* Parliamentary Hiſt. v. 9, p. 432.

armies

armies in the kingdom*. And ſoon after an ordinance appointing commiſſioners for executing martial law, paſſed the two houſes of parliament.

THOUGH this ordinance could no more be deemed a legal authority for the exerciſe of martial law (from wanting the ſanction and conſent of the third branch of the legiſlature) than the execution of it merely at the diſcretion of the crown, yet it may be ſaid to have reduced martial law to a more regular ſyſtem; and as it appears in ſome meaſure to have been adopted as a model for the mutiny act paſſed ſince the Revolution, I ſhall inſert the principal articles of it.

BY this ordinance, which paſſed in 1644, it was ordained that the Earl of Eſſex, general of the forces raiſed by the authority of the parliament, together with fifty-ſix others named therein (among whom where

* Parliamentary Hiſt, v. 13, p. 32, 33.

ſeveral

ſeveral peers, members of the houſe of commons, and field officers of the army, or any twelve or more of them, whereof ſuch of the members of either houſe of parliament, as hold commiſſions and commands in any of the armies or garriſons, and Sir Nathaniel Brett were to be three) ſhould be commiſſioners, and have full power and authority to hear and determine all ſuch cauſes as belonged to military cognizance, according to the articles mentioned in the ordinance, and to proceed to the trial, condemnation, and execution of all offenders againſt the ſaid articles, and to inflict upon them ſuch puniſhment either by death or otherwiſe, corporally, as the ſaid commiſſioners, or the major part of them then preſent, ſhall judge to appertain to juſtice, according to the nature of the offence, and the articles here enſuing, viz.

1. No perſon whatever, was to go from the cities of London and Weſtminſter, or any part of the kingdom, under the power of

of the parliament, to the king or queen, or lords of the council abiding with them, or any commander or officer of the king's army; or to give or hold intelligence by letters, meſſages, or otherwiſe, with any in arms againſt the parliament, without conſent of both houſes of parliament, or the committee appointed by ordinance of parliament for managing the war; the lord general of the forces raiſed by the two houſes; or from the reſpective officers that ſhould command in chief any of the ſaid forces, upon pain of death, or other corporal puniſhment at diſcretion.

2. WHOEVER plotted, contrived, or endeavoured the ſurrendering, betraying, or yielding up to the enemy; or contrary to the rules of war, ſurrendered, betrayed, or yielded up any cities, towns, forts, magazines, under the power of the parliament, were to be puniſhed with death.

3. NO perſon or perſons whatever, not under the power of the enemy, ſhould voluntarily

luntarily relieve any perſon, being in arms againſt the parliament, knowing him to have been ſo in arms, with money, victuals, or ammunition, upon pain of death or other corporal puniſhment, at diſcretion; nor ſhould voluntarily and knowingly harbour or receive any perſon being in arms, as aforeſaid, upon pain of puniſhment at diſcretion.

4. No officer or ſoldier ſhould make any mutinous aſſemblies, or be aſſiſting thereto, upon pain of death.

5. No guardian or officer of any priſon was wilfully to ſuffer any priſoner of war to eſcape, under pain of death; or negligently, under pain of impriſonment, and further puniſhment at diſcretion.

6. Whosoever voluntarily took up arms againſt the parliament, having taken the national covenant, ſhould die without mercy.

7. Whatsoever

7. Whatsoever officer or commander had or ſhould deſert their truſt, and adhere to the enemy, ſhould die without mercy.

And it was further ordained that the ſaid commiſſioners, or any twelve or more of them (whereof the members of either houſe of parliament, as had commiſſions or commands in any of the armies or garriſons, and Sir Nathaniel Brett, were always to be three) ſhould be authoriſed from time to time, ſo often as they ſhould think fit, or ſhould be ordered thereunto by both or either houſe of parliament, to ſit in ſome convenient place within the cities of London and Weſtminſter, or lines of communication, and to appoint a judge advocate, a provoſt marſhal, and all other officers needful.

And all mayors, ſheriffs, juſtices of the peace, conſtables, bailiffs, and other officers, were to be aiding and aſſiſting the commiſſioners in the execution of the premiſes; and the ſaid commiſſioners and every other

other person assisting them, should be saved harmless, and indemnified for what they did therein by authority of parliament.

Provided nevertheless that no member of either house of parliament, or assistants of the house of peers, should be questioned or tried before the commissioners appointed by virtue of the ordinancce, without assent and leave first obtained of both houses of parliament.

It was also provided that this ordinance, and the authority thereby given to the persons therein mentioned, should be in force for only four months from the making thereof; and that for any offence hereafter to be committed, it should not take place until eight days after the publication thereof, and any thing contained therein to the contrary notwithstanding.

Sir John Hotham and his son were among the first who were tried by a court martial,

martial, under authority of this ordinance, and were ſentenced to ſuffer death for betraying the parliament's cauſe; and the warrant for their execution was directed to the lieutenant of the tower, the ſheriffs of London and Middleſex, the provoſt marſhal, &c.

UPON the expiration of this ordinance, a new one for the ſame porpoſe was ſent up from the commons to the other houſe, but the lords would not paſs it in the manner and form they had ſent it, alledging that this new law ſtruck at ſeveral of their privileges, and concluded with this ancient adage, *Nolumus leges angliæ mutari*; and the commons being as reſolute on their part, nothing was concluded on with regard to this buſineſs at that time*; but the year following (1646) the houſe of lords conſented to an ordinance of this ſort, with ſome few alterations and additional pro-

* Parliamentary Hiſt. v. 14, p. 257.

viſoes,

viſoes, nine peers entering their diſſent againſt it*.

By this ordinance, which was to continue in force only three months, Sir Thomas Fairfax, general of the parliamentary army, Major-General Skipton, and about forty more officers, civilians, and common lawyers, or any twelve or more of them, were appointed a court martial within London and Weſtminſter, and the lines of communication, to ſit on all ſuch as ſhould offend againſt the articles contained therein; which were nearly the ſame as thoſe expreſſed in the former ordinance, with this additional one, That whoever came from the king's quarters, or had been there for a month paſt, or borne arms againſt the parliament, and ſhould come into their quarters, without a paſs, drum, or trumpet, and not render himſelf up within forty-eight hours, ſhould die without mercy.

* Parliamentary Hiſt. v. 14, p. 313, 314.

The commissioners were likewise impowered to issue warrants, to sit at their discretion, and to appoint a judge advocate and provost marshal; and all mayors and sheriffs were ordered to be aiding and assisting, &c. but this ordinance was not to extend to any member of either house of parliament; and no sentence was to pass but upon the testimony of two witnesses, or confession of the party; and no execution of death was to take place, till after six days notice to both houses of parliament.

No new parliamentary ordinance for martial law passed upon the expiration of this one; for indeed, very soon afterwards, the authority of the army, by the intrigues of Cromwell and his party, became superior to that of the parliament.

Upon a faction being raised in the army, by a set of men under the name of *Levellers*, whose object was that all parties should be reduced to a level, and that an equality of

of poffeffion and power fhould be eftablifhed throughout the nation; for wherefore faid they, in the true fanatical language of the times, fhould not a common foldier, enlightened by the holy fpirit, have the fame privileges with the commander? or why give the officer fo many advantages contrary to the fpirit of chriftian equality? Cromwell feized the chiefs of the mutiny, and without waiting for the authority of parliamentary ordinances, inftantly hanged them up, and the reft returned to their duty. But in March 1649, monarchy being fuppreffed, and the houfe of lords voted ufelefs, a bill was brought into the houfe of commons (now the only remaining branch of the legiflature) for eftablifhing a court martial within the cities of London and Weftminfter, and the late lines of communication, which was to be called the high court of juftice; and it paffed without a divifion, upon a provifo being inferted, that nothing contained therein fhould extend to the diminution of any power or authority formerly given to

the lord general or his council of war, or to the admirals at ſea, by the authority of parliament, for executing martial law*.

Upon the reſtoration of Charles II. one of the firſt ſteps taken by the parliament was to diſband the army, and to regulate the militia, among whom a military ſubordination (though not without a violent contention in the houſe of commons) was eſtabliſhed, whenever they were drawn out, and fines and impriſonments impoſed upon them for particular crimes and omiſſions.

King Charles however kept up 5000 regular troops for guards and garriſons, by his own authority, which his ſucceſſor James II. by degrees increaſed to 30,000; and more numerous armies were occaſionally raiſed by authority of parliament, during Charles's wars with France and Holland; yet we find no act of parliament in the ſtatute books

* Parliamentary Hiſt. v. 19, p. 253.

for

for the government of theſe troops; nor was it till after the Revolution, that a regular act of the whole legiſlature (which alone could give it the force of a law) paſſed for puniſhing mutiny and deſertion, &c. by courts martial.

This act was occaſioned by a mutiny in a body of Engliſh and Scots troops (among whom were the regiment of dragoons, now called the Scots Greys, and the Royal Scots regiment of foot) upon their being ordered to Holland, to replace ſome of the Dutch troops which King William had brought over with him, and intended to keep in England. The Royal Scots regiment had been diſguſted on Lord Dumbarton's being diſmiſſed from the command of it, and Marſhall Schomberg put in his room. It was inſinuated to the Engliſh part of the mutineers, by the emiſſaries of James, that they, who were the only remains of the army that had continued faithful to their ſovereign, were now to be

punished for that fidelity which was the principal point of honour among soldiers; and the Scots insisted that they were independent of the government of England, and its laws, and that their national assembly had not yet renounced allegiance to King James*. King William immediately cummunicated this event to both houses of parliament, who readily agreed to give their sanction to punish the insurgents; and on the 3d of April 1689, passed an act for punishing mutiny and desertion, &c. which was to continue in force till November following, and no longer: it was however renewed again the next January, and has, with the interruption of about three years *only*, in the peaceable part of King William's reign, viz. from 10th of April 1698, to 20th of February 1701, been annually renewed ever since (with some occasional alterations and amendments) as well in times of peace as of war.

* Dalrymple's Mem. of Great Britain and Ireland, p. 1, p. 264 to 250.

CHAP.

CHAPTER II.

Of the Power and Authority of Courts Martial, as at preſent eſtabliſhed.

MARTIAL law, as formerly exerciſed, at the diſcretion of the crown, and often made ſubſervient to bad purpoſes, juſtly became obnoxious to the people in general, and not only the propriety, but the legality of its being executed in times of peace, have been abſolutely denied by ſome of the moſt eminent ſages of the law.

IT is laid down, ſays Sir Edward Coke *, That if a lieutenant or other, that hath commiſſion of martial law, doth, in time of peace, hang or otherwiſe execute any man, by colour of martial law, this is murder, for it is againſt *Magna Charta;* and Sir Matthew Hale † declares martial law to be

* 3 Inſtitute, 52.

† Hale's Hiſt. of the Common Law, c. 2.

in reality no law, but ſomething indulged, rather than allowed as a law; that the neceſſity of order and diſcipline is the only thing which can give it countenance, and therefore it ought not to be permitted in times of peace, when the king's courts are open for all perſons to receive juſtice, according to the laws of the land; and if a court martial put a man to death in time of peace, the officers are guilty of murder*.

The exerciſe of martial law by courts martial, in times of peace, with objections of ſuch weight and authority againſt it, has, at firſt ſight, the appearance of a proceeding fraught with the moſt dangerous conſequences to thoſe concerned in it; but with all due deference to the opinions of thoſe able lawyers, we will preſume to dive a little deeper into this matter.

One of the objections againſt it ſeems to be founded on the other; that is to ſay,

* Hale's Pleas of the Crown, p. 46.

it

it is deemed illegal, becaufe it is contrary to *Magna Charta;* if therefore we can obviate the latter, the former will lofe its exiftence in courfe. To effect this, it will be neceffary to confider the nature of the laws of England, which may be divided into two kinds, viz. *lex non fcripta*, the unwritten or common law; and *lex fcripta*, the written or ftatute law.

Lex non fcripta, or the common law, which is the moft ancient and general law of the realm, is properly the cuftoms of the kingdom, which by length of time have been generally received, and held as fuch, before any ftatute or written law was made to alter them.

Lex fcripta, or rather *leges fcriptæ*, or the written laws of the kingdom, are ftatutes, edicts or acts made by the king's majefty, by and with the advice and confent of the lords fpiritual and temporal, and commons in parliament affembled, and are either de-

claratory of the common law, or *remedial* of some defects therein*.

The statute of *Magna Charta*, which is the oldest now extant, and printed in the statute book, was enacted on a memorable occasion: King John having refused to confirm the laws of Edward the Confessor, who had collected those made by his predecessors the Danes, Saxons, and Mercians, and formed them into one body, known by the name of the Common Law of England, the barons took up arms against him, and obliged him at last to sign *Magna Charta*; which, with some alterations and amendments, was afterwards confirmed in parliament, by his son Henry III. By this charter the common law was confirmed, and such alterations and amendments made therein as then appeared to be necessary.

By chapter 29th of *Magna Charta*, it is declared that no freeman shall be taken,

* Blackstone's Com. b. 1, p. 85, 86.

imprisoned,

imprisoned, or disseized of his freehold or liberties, or free customs; or be outlawed, or exiled, or any otherwise destroyed; and that no sentence shall pass upon him, nor he be condemned, but by lawful judgment of his peers, or by the law of the land; and on this chapter it is that both Coke and Hale appear to have founded their opinions.

But at the time of enacting *Magna Charta*, and long after, standing armies were unknown in England, Henry VII. being the first who raised a body of regular troops, called the yeomen of the guard; and even when these authors wrote*, though regular troops had been frequently raised in times of war, and subjected to martial law, yet the keeping them embodied, within the kingdom, in times of peace, and making not only the soldiery, but other subjects of the realm liable to martial law, at the will of the crown, was an illegal extention of the prerogative, exercised by

* They both wrote before the Revolution.

ſucceeding monarchs previous to the reſtoration, and which in the reign of Charles I. alarmed the other branches of the legiſlature, and occaſioned that oppoſition which brought about the ſtatute called the *Petition of Rights.*

As future exigences have ariſen in the ſtate, it has become neceſſary to alter and amend the old laws, and enact new ones; and ſince the cuſtom of keeping up ſtanding armies, in time of peace as well as war, has become prevalent and general throughout Europe, the legiſlature of Great Britain has alſo judged it neceſſary, for the ſafety of the kingdom, the defence of its poſſeſſions, and the balance of power in Europe (as the preamble to the act for puniſhing mutiny and deſertion, &c. expreſſes it) to maintain, even in times of peace, a ſtanding body of troops, and authoriſe the exerciſe of martial law among them.

A PROPER distinction then should be made between martial law as formerly executed, entirely at the discretion of the crown, and unbounded in its authority, either as to persons or crimes, and martial law, as at present established, being now limited with regard to both. Courts martial are at present held by the same authority as the other courts of judicature of the kingdom, and the king, (or his generals when empowered to appoint them) has the same prerogative of moderating the rigour of law, and pardoning and remitting punishment; but he can no more add to, nor alter the sentence of a court martial, than he can a judgment given in the courts of law. The king has an undoubted right to dismiss an officer or soldier from his service without a trial, but this power cannot bias a court martial in a matter left to their decision, if men most solemnly sworn to be guided by their consciences, and to administer justice without partiality, favour,

or

or affection*, can be trusted. Martial law is now exercised within its proper limits, by the advice and concurrence of parliament, whose jurisdiction, says Sir Edward Coke†, is so transcendent and absolute, that it cannot be confined either to causes or persons, within any bounds. It hath sovereign and uncontroulable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all denominations, ecclesiastical or temporal, civil, *military*, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within reach of this extraordinary tribunal. It can change and create afresh even the constitution; in short it can do every thing

* Mutiny Act, art. 5.
† 4 Institute, 36.

that

that is not naturally impoſſible; and therefore ſome have not ſcrupled to call its power by a figure rather too bold, the omnipotence of parliament*. The condemnation of criminals by courts martial, acting under ſuch authority, cannot, I ſhould conceive, be regarded as illegal, or contrary to *Magna Charta*, ſince during the exiſtence of the ſtatute by which they are held, martial law is certainly part of the *lex terræ*, or law of the land. Courts martial ſtill act by particular appointment of the crown, for the king being the ſupreme magiſtrate of the kingdom, and intruſted with the whole executive power of the law, no court whatſoever can have any juriſdiction, unleſs it ſome way or other derive it from the crown†; but their authority originates from, and they are empowered to puniſh with death or otherwiſe, in peace as well as war, within the kingdom, as well as on foreign

* Blackſtone's Commentaries, b. 1, p. 161.

† Staunford's Pleas of the crown, p. 54.

ſervice,

ſervice, by an act of this high tribunal of parliament, made for the ſame purpoſes as *Magna Charta* and every other ſubſequent ſtatute, viz. to alter, amend, and remedy the defects of the common law, and prior ſtatutes, and ſupercede them by the eſtabliſhed maxim in law, that when the common law and ſtatute law differ, the common law gives place to the ſtatute, and an old ſtatute gives place to a new one; this is on the general principle that *leges poſteriores, priores contrarias abrogant**.

STATUTE laws in general have been found fault with, as being impoſed upon the ſubjects before any probation or trial is made, whether they are beneficial to the nation, or agreeable to the nature of the people, except where they are firſt made temporary, and, for their experienced uſefulneſs, afterwards made perpetual: whereas cuſtoms, on which the common law is

* Blackſtone's Com. b, 1, p. 89.

founded,

founded, bind not till they have been tried and approved of, time out of mind. But this objection cannot hold good againſt the act for puniſhing mutiny and deſertion, &c. by which martial law and courts martial are now authoriſed, ſince it comes within the exception; for the legiſlature, cautious of entailing a permanent ſtanding army on the Britiſh conſtitution, have admitted of its exiſtence only from year to year. This act however, has been annually paſſed with very little interruption, ſince the revolution, and is therefore not the work of any particular parliament, but that of ſucceſſive ones, for near a century, which carries with it a ſtrong indication of its utility.

I MUST acknowledge, with the learned commentator on the laws of England*, (whom I am ever happy to correſpond in opinion with) that there is great room for amendment in the preſent code of laws for the government of the ſoldiery, and

* Sir William Blackſtone.

could

could wiſh with him, that this matter was more attended to upon a future reviſion of the mutiny bill; but this objection will not hold good with regard to the general tenor of the act. It has been urged againſt trials by courts martial, as eſtabliſhed in the Britiſh ſervice, that the priſoner, if a private ſoldier, has not the privilege of being tried by his peers or equals, ſince it is enacted, that no member ſhall be under the degree of a commiſſioned officer; and the cuſtom obſerved in many foreign ſervices, of admitting ſome of the ſame rank with the priſoner to be members of the court, has been recommended as worthy of imitation. But for my own part, I cannot help doubting, whether, if our preſent mode of trial wants amendment, the remedy propoſed would be efficacious.

Too many among the lower ranks of the ſoldiery are, I am ſorry to ſay, of very exceptionable characters, owing chiefly to the modern method of recruiting our armies,

mies, by enlifting every one who offers himfelf, provided he be of a certain make, age, and ftature, without paying the leaft attention to his former character and way of life; and fometimes by even draining the public goals of the kingdom. What juftice then can be expected from fuch wretches, who will fcarcely punifh others for crimes which, from being daily guilty of themfelves, they do not appear to regard as fuch? and as to the better fort among them, (for it would be the greateft injuftice to fuppofe, that there are not many men in the very loweft ranks of the army of a very different ftamp,) I am perfuaded, that fhould it be the fate of any of them to be brought to trial, for any offence againft military difcipline, they would rather rifk the decifion of their caufe to commiffioned officers, with the privilege of challenging fuch as may be exceptionable to them, (of which I fhall fpeak more fully hereafter) than truft to fuch men as I have juft defcribed, who, as they

they become loſt to ſhame, become loſt to honour and veracity, and would puniſh their fellow ſoldiers or peers, merely for being better ſoldiers than themſelves. As officers who are members of courts martial are liable to be tried by the ſame laws, and for the ſame crimes, their ſuperior rank alone cannot be aſſigned as a reaſon for not regarding them as the peers of a ſoldier. In a trial by a jury in a court of common law, I do not imagine that a priſoner would except againſt a juror merely becauſe he was in a higher ſtation of life than himſelf.

But, ſhould it be ſtill denied, that a criminal of an inferior rank, brought before a court martial, does not enjoy the privilege of being tried by his peers in its full extent, I make no doubt that it will appear from the ſequel, that he has many other advantages which are peculiar to this mode of trial.

Courts martial cannot ſit before eight o'clock in the morning, or after three in the afternoon*, except in caſes which require an immediate example; the attendance therefore of the members does not exceed ſeven hours at a time, and they are at liberty to adjourn from day to day, till they have fully conſidered the matter before them; and when they come to give their opinions, they are not under the neceſſity of being unanimous, but the priſoner is condemned or acquitted by a majority of voices, except in caſes of death, where nine out of thirteen, or two thirds, if there be more than thirteen preſent, muſt concur in opinion†.

No one is under any compulſion, but are all, not only free, but abſolutely ſworn to judge according to their conſciences; and in order to prevent, as far as poſſible, one member being biaſſed by the opinion

* Articles of War, ſ. 15, a. 9.
† Idem, ſ. 15, a. 8.

of

of another, as it ſeems more likely that the younger officers would adopt that of their ſuperiors, than the elder acquieſce in that of a junior, the youngeſt member of a court martial, in the ſame manner as is obſerved at all debates in the privy council, and by the houſe of lords at the trial of a peer (where unanimity is not required) gives his opinion firſt*, †and as it is a part of

* Articles of War, ſ. 15, a. 7.

† In the French ſervice, the precaution taken to prevent one member from being prejudiced by the opinion of another, is ſtill more certain: the youngeſt member firſt inſerts his opinion at the top of a ſheet of paper provided for that purpoſe; then folds down the part on which he has written, in order that thoſe who write after him may not ſee it. All the others obſerve the ſame method, up to the eldeſt member, by whom the paper is delivered to the preſident, who unfolds it in order to examine the different ſentences, having previouſly inſerted his own, which is conſidered as two voices if given in favour of the priſoner, but as only one againſt him. *Cours de la Science Militaire de Bardet de Villeneuve*, tom. 1, p. 64.

the

the duty of an officer to be a member of a court martial from the time of his being ordered upon this duty, no other ſervice is expected from him, till the diſſolution of the court, by proper authority.

FROM hence it is evident that he ſuffers no inconveniency of body, nor prejudice to his affairs, to induce him to join in a verdict oppoſite to his real opinion; he is not only left at liberty, but takes a ſacred oath to let his conſcience be his guide; and by religiouſly adhering to it, he has the heart-felt ſatisfaction of never having voluntarily let the guilty go unpuniſhed, or the innocent ſuffer.

FURTHER, as every particular circumſtance given in evidence is minuted down by the judge advocate, the members of a court martial may recur to them as often as they pleaſe, for it would be hardly poſſible to retain every part of it in their memories, particularly in complicated caſes, and

and the moſt minute circumſtance will frequently turn the ſcale for or againſt the priſoner.

Sir William Blackſtone, in ſpeaking of the advantages of a ſecond trial by a jury, obſerves that, if every verdict was final in the firſt inſtance, it would tend to deſtroy this valuable method of trial. Cauſes of great importance come often to be tried by a jury, merely upon the general iſſue, where the facts are complicated and intricate, the evidence of great length and variety, and ſometimes contradicting each other; and where the nature of the diſpute very frequently introduces nice queſtions and ſubtleties of law. Either party may be ſurpriſed by a piece of evidence, which (had he known of its production) he could have explained or anſwered; or may be puzzled by a legal doubt, which a little recollection would have ſolved. In the hurry of a trial the ableſt judge may miſtake the law, and miſdirect the jury; he may not be

be able ſo to ſtate and range the evidence, as to lay it clearly before them; nor to take off the artful impreſſions which have been made on their minds by learned and experienced advocates.

THE jury are to give in their opinions *inſtanter*; that is, before they ſeparate, eat, or drink; and under theſe circumſtances the moſt intelligent and beſt-intentioned men may bring in a verdict, which they themſelves, upon cool deliberation, would wiſh to reverſe*.

I CANNOT produce ſtronger arguments in favour of the mode of proceeding at courts martial, where, by adjourning from time to time, and recording the evidence, &c. for the inſpection of the members, all the inconveniences the learned judge has pointed out may be obviated, and a ſecond trial in general rendered unneceſſary.

* Blackſtone's Comment. b. 3, p. 390.

It may perhaps be alleged, that at a court martial a priſoner is tried by thirteen perſons only, and that in a court of law no man can be found guilty, but by the judgment of, at leaſt, twenty four; the concurrence of twelve or more*, which form the grand jury, being neceſſary to find the bill of indictment againſt him, and the unanimous verdict of twelve more, which compoſe the petty jury, being requiſite to find him guilty. As I would wiſh to leave no argument unanſwered, that there is the leaſt probability of being advanced againſt the uprightneſs of courts martial, (as at preſent eſtabliſhed). I will endeavour to ſhew that this allegation does not carry that weight with it, which may at firſt be imagined.

As to the advantage gained to a criminal, by the previous examination of a grand jury, it is notorious that many are brought

* The grand jury never conſiſts of leſs than twelve, and ſometimes of twenty-three.

to trial by information; and even when the matter is previously examined into by a grand jury, as they only hear the evidences on behalf of the prosecution, it very often happens that a man indicted for wilful murder by them, is found guilty of only manslaughter, or chance-medley, and sometimes homicide *se defendendo*, or *per infortunium* by the petty jury, before whom he is allowed to produce his own witnesses, and make his defence; and of other crimes, for which a grand jury may find a bill of indictment, the petty jury will often acquit a prisoner.

Any one, therefore, against whom a grand jury refuses to find a bill, for want of sufficient evidence, would run but little risk of being found guilty before a petty jury or a court martial, without such previous examination: and as the opinion of a grand jury is not definitive, being rendered invalid, if that of the petty jury differs from it, a criminal is in fact tried by the twelve only, who compose the latter, and whose

ſentence he muſt ſubmit to; for the grand jury are only to enquire upon their oaths, whether there be ſufficient cauſe to call upon the party to anſwer it; and the finding of an indictment is only in the nature of an accuſation, which is afterwards to be tried and determined by the petty jury*. As ſuch, the place of a grand jury is ſupplied by a court of enquiry, which is often held previous to a court martial, where there is a doubt of a ſufficiency of cauſe to bring an offender before that judicature. In fine, a criminal at a court martial is in reality tried by as many, and often more than in a court of law; for though the former is uſually compoſed of a preſident and twelve members, it is not confined to that number, whereas a petty jury never exceeds twelve†. My intention is by no means to caſt reflections upon the mode of trial by jury, that glorious bulwark of Engliſh liberty, but,

* Blackſtone's Comment. b. 4, p. 300,

† Hale's Hiſt. Plac. Coronæ, p. 161.

on

on the contrary, to fhew that courts martial, as far as the nature of the cafe will admit of, adopt this mode; and where they may fall fhort of the advantages of it in one inftance, they endeavour to gain them in another.

It may not be improper here to remark, that although a prefident and twelve members are fufficient to conftitute a legal court, yet it is frequently judged neceffary to affemble and fwear in more, in order, as far as poffible, to guard againft accidents, arifing from ficknefs or other caufes of the non-attendance of fome of them. Courts martial, from not having taken this precaution, and at the fame time unaware of the illegality of the meafure, have, upon the delinquency of one or more of their members, taken upon themfelves to admit new ones during the courfe of trial, and have then proceeded, as if they had, from the commencement, taken their feats as fuch; judging it neceffary only to read over the evi-

dence already gone through, in his (the new member's) preſence; but proceedings of courts martial thus conducted, can never meet with the approbation or confirmation of his majeſty, or thoſe in authority under him. Whilſt there is a quorum of thirteen (the preſident included) of thoſe originally ſworn in, the court may proceed to buſineſs, although others who come under this deſcription do not attend; but if it becomes neceſſary to call in a new member, the court muſt proceed *de novo*. However, the records of a former court are often admitted, particularly by conſent of the contending parties, as evidence on a future one, under certain reſtrictions and regulations, as was done on the trial of Lord George Sackville, in the year 1760, during which the mutiny act, by the authority whereof the court was held, expired, and another took place; as alſo on that of Colonel Coſmo Gordon, when the depoſitions of ſuch witneſſes as had given teſtimony on the trial of Lieutenant-Colonel Thomas,

and

and were dead or diſperſed, were read and entered as a part of their proceedings.

The method of trial by twelve men is generally allowed to be very ancient, though writers differ concerning its origin, and the firſt inſtitution of it in England. It is mentioned by ſome authors, obſerves Sir William Temple*, as having been introduced among us by William the Conqueror, but it is evident, continues he, to have been an inſtitution very ancient among the Saxons, and to have been derived and obſerved during the whole ſucceſſion of the Engliſh kings, and even in the Daniſh reigns, without interruption; nor are there wanting traces or appearances of it from the very original inſtitution of Odin, the firſt leader of the Aſiatic Goths or Getæ into Europe, and the founder of that mighty kingdom round the Baltic ſea, from whence all the Gothic governments in the north-weſt parts of the

* Temple's Works, v. 4, p. 560.

world were derived, by the ſpreading conqueſts of thoſe northern races.

It is true, the terms of *jury* and *verdict* were introduced by the Normans, with many others, in the ſtyle and practice of our laws; and trials by twelve men were in uſe in Normandy before the conqueſt; but it is moſt probable that neither the Engliſh received it from the Normans, nor the Normans from the Engliſh, but that both nations, deriving their origin from thoſe ancient Goths, agreed in ſeveral cuſtoms or inſtitutions, deduced from their common anceſtors.

Some authors have ſuppoſed that we borrowed it, with ſeveral other of our cuſtoms and laws, from the Grecians, (among whom this number was both famous and ſacred) to whom, they were of opinion, the Britiſh iſles were known long before they were diſcovered by the Romans.

But

But whatever may have been the original inſtitution of trials by twelve men, that of obliging them to be unanimous ſeems to be of a much more modern date; for we find, in the hiſtory of Greece *, that Oreſtes, who was tried for murder in the court of Areopagus †, at Athens, was acquitted by the ſuffrages for and againſt him being equal, in which caſe judgment always paſſed in favour of the defendant. And among the Romans (who are alſo ſuppoſed to have borrowed the number twelve from the Grecians) the cuſtom was, when the prætor

* Stanyan's Grecian Hiſtory, v. 2, p. 56.

† This court was called *Areopagus*, becauſe it aſſembled on a hill not far from the Citadel, called *Arios Pagos*, i. e. Mars's-Hill; Mars having been the firſt criminal, as ſome ſay, who was tried in this court. Their fame was ſo great, that foreign nations came to them for their deciſion; and Demoſthenes ſays, that neither plaintiff nor defendant ever went away diſſatisfied. They decided all cauſes in the dark, that ſeeing neither plaintiff nor defendant, their paſſions might be uninfluenced. —Univerſal Hiſt. b. 1, c. 16, p. 309, 330, 413.

ſent out the jury to conſult, *(mittebat judices in concilium)* he delivered to every one three tablets, covered with wax; one of abſolution, another of condemnation, and a third of ampliation or adjournment of the trial; the firſt being marked with A. the ſecond with C. and the third with N. L. or *non liquit;* and then the tablets being thrown into a proper number of urns or boxes, which were ſet in the place where the jury withdrew, and taken out by the prætor, he pronounced ſentence according to the greateſt number.

In giving ſentence, the major part of the judges were required to overthrow the defendant; if the numbers were equally divided, the defendant was actually cleared*.

And in the *nembda* or jury of the ancient Goths, there was required (even in criminal caſes) only the conſent of the ma-

* Kennet's Antiquities of *Rome*, p. 130, 147.

jor

jor part; and in case of an equality, the defendant was held to be acquitted*.

The necessity of a total unanimity seems then to be peculiar to our own constitution, and even amongst us, it was not necessary anciently (at least in civil causes) that all the twelve should agree; but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them, as to the reasons of their differing in opinion; and if, after such examination, both sides persisted in their former opinions, the court commanded both verdicts to be fully and distinctly recorded, and judgment was given *ex dicto majoribus parte juratorum* † And according to Bracton and Fleta, if the jurors dissented, sometimes there was added a number equal to the greatest party, and

* Barrington on the Statutes, 17, 18, 19. Steenhook, l. 1, c. 4. Blackstone's Com. b. 3, p. 376.

† Hale's Hist. Placit. Coronæ, p. 257, note c.

they were then to give their verdict by twelve of the old jurors, and the jurors so added* †.

The crimes that are cognizable by a court martial, as repugnant to military discipline, are pointed out by the mutiny act and articles of war, which every military man is or ought to be fully acquainted with, and therefore not necessary to be recited here; and as to other crimes which officers and soldiers being guilty of, are to be tried for by the ordinary course of law, in like manner

* Hale's Hist. Common Law, c. 12, p. 258.

† "Contingit etiam multotiens quod juratores in veritate dicenda, sunt sibi contrarii, ita quod in unam concordare non possunt sententiam, quo casû, de concilio curiæ affertietur assissa, ita quod apponantur alii juxta numerum majoris partis quæ dissenserit, vel saltem quatuor, vel sex, et adjungantur aliis, vel etiam per seipos sine aliis, de veritate discutient et judicient, et per se respondeant, et coram vindictum allocabitur, et tenebitur cum quibus ipsi convenirent."

Bracton, lib. 4, c. 19.

manner with other ſubjects*, it would be needleſs to trouble my military readers (for whoſe uſe and amuſement this treatiſe is chiefly intended) with a detail of them†. The perſons liable to martial law are likewiſe enumerated therein‡, and therefore a

* Mutiny Act, a. 62. Articles of War, ſ. 11, a. 2.

† In ſome parts of his majeſty's dominions, viz. Gibraltar, &c. where there is no form of civil judicature in force, all perſons guilty of capital crimes, or other offences, are to be tried by general courts martial (*a*); but as to the officers who may be employed on ſuch trials, I muſt refer to authors who have wrote fully on the pleas of the crown.

‡ The articles of war mention only officers, ſoldiers, and perſons ſerving with the armies in the field, being ſubject to martial law; but Hale and other eminent lawyers are of opinion that aliens, who in a hoſtile manner invade the kingdom, whether their king were at war or at peace with ours, and whether they come by themſelves or in company with Engliſh traitors, cannot be puniſhed as traitors, but muſt be dealt with by martial law.— Hale's Pleas of the Crown, c. 10, 15. 3 Coke's Inſt. 11.

(*a*) *Articles of War*, *ſ.* 20, *a.* 2.

further

further expofition of them is equally unneceffary. And the authority of courts martial to take cognizance of fuch crimes and perfons as are under their jurifdiction, having been fully confidered, the errors they are in danger of falling into muft arife from their manner of proceeding againft offenders; for fo exact is the law, even with regard to form, that, fays Lord Chief Juftice Hale*, "If a commiffion of "goal-delivery iffues to A. B. &c. they fit "one day and forget to adjourn their com"miffion, or the clerk forgets to enter the "adjournment; a felony is committed the "next day, and they proceed in feffions to "take an indictment and give judgment of "death againft a malefactor; this judgment "is erroneous, and the clerk of affizes fhall "never be permitted to amend the record, "and enter an adjournment; and this judg"ment, being erroneous, fhall be reverfed: "but it makes not the judges guilty of mur"der or homicide, though in a ftrictnefs

* 1 Hale's Hift. Placit. Cor. p. 498.

"of

"of law their commiſſion was determined ".by the firſt day's ſeſſion, without adjourn- " ment."

I ſhall therefore endeavour, in the courſe of this work, to lay down ſuch rules for the proceedings of military courts, as may prevent my brother officers, when employed on thoſe duties, from acting illegally or improperly, which they are ſometimes unknowingly led to do, and are thereby laid open to a proſecution in a court of law*.

For

* The judgments of courts martial, beſides being open to the diſapprobation of the king or his commanders in chief, are liable, like thoſe of other courts, to be taken cognizance of, and the members puniſhed for illegal proceedings; for according to law, the court of King's Bench, being the higheſt court of common law, hath not only power to reverſe erroneous judgments given by inferior courts, but alſo to puniſh all inferior magiſtrates, and all officers of juſtice, for all wilful and corrupt abuſes of authority againſt the known, obvious, and common principles of natural juſtice(*a*).

(*a*) *Hawkins's Pleas of the Crown*, *b.* 2, *c.* 4, *ſ.* 10.

Beſides,

For this purpose I shall endeavour to collect

Besides, the act for punishing mutiny and desertion, directs that every action, bill, plaint, or suit against any member or minister of a court martial, in respect to any sentence, shall be brought into some of the courts of record at Westminster, Dublin, &c.(*b*) and I could enumerate many instances of prosecutions of this nature being brought into Westminster Hall, &c. but let one suffice. In the year 1743, a lieutenant of marines was tried by a court martial on board the Oxford man of war, in Port Royal, in Jamaica, for disobedience of his captain's orders, and condemned to suffer an imprisonment of fifteen years, and rendered for ever incapable of his Majesty's service. The evidences brought against him were the depositions of a parcel of illiterate people reduced into writing, several days before he was brought to trial, which persons were entirely unknown to him, he having never seen them nor heard their names before; and upon his objecting to the evidence, he was brow-beat, and loaded with curses and imprecations. For which illegal proceedings, upon his return to England (his sentence being previously remitted by his late majesty) he brought an action in the court of Common Pleas, and had a verdict of

(*b*) *Article* 63.

1000l.

collect every rule and regulation of the courts of law, which may be applicable to courts martial; for although courts martial

1000l. damages given him. It must however be a satisfaction to every officer to know, that if he has the mortification to be prosecuted in a court of law for his proceedings as a member of a court martial, he is not liable to be punished for mere mistakes, which an honest well-meaning man may innocently fall into (*c*); and if the plaintiff or prosecutor becomes non-suited by the verdict of the jury passing with the defendant, he shall recover his treble costs, which he shall have sustained, by reason of his wrongful vexation, in defence of said action or suit (*d*). But there is also another tribunal, before which the proceedings of courts martial are liable to *censure at least*. I mean the house of commons, where, in the year 1744, it was resolved, (notwithstanding it was warmly opposed by Mr. Pelham, who was at that time first lord of the treasury, and chancellor of the exchequer, and far from an unpopular minister) that the proceedings of a naval court martial held for enquiring into the conduct of Captain Norris, &c. were *partial*, *arbitrary*, and *illegal*. —Debates of the house of commons, 18 George II.

(*c*) *Hawkins's Pleas of the Crown, b.* 2, *c.* 4, *s.* 10.

(*d*) *Act for punishing Mutiny, &c, art.* 62.

proceed

proceed by virtue of a particular ſtatute, which, like all others, was made to ſupply the defects of the common law, which had no authority to take cognizance of many of the crimes therein mentioned; yet, as the method of proceeding againſt criminals had been long eſtabliſhed, the act for puniſhing officers and ſoldiers by martial law has only laid down ſuch rules for the proceedings of courts martial, as were intended to differ from the uſual methods in the ordinary courts of law. It is therefore natural to ſuppoſe, that where the act is ſilent, it ſhould be underſtood, that the manner of proceeding at courts martial ought to be regulated by that of the other eſtabliſhed courts of judicature of the kingdom.

CHAP.

CHAPTER III.

Of Courts of Enquiry.

COURTS of enquiry have been frequently held in the army, and cuſtom ſeems to have eſtabliſhed them as a neceſſary part of military juriſdiction, though in whom the power of appointing them is lodged, and what their uſe and authority are, after their appointment, do not appear ever to have been regularly aſcertained. For neither the mutiny act nor the articles of war make the leaſt mention of them. In treating, therefore, on this ſubject, I labour under a particular diſadvantage. I ſhall however preſume, though with diffidence, to offer my ſentiments on the matter, and ſubmit them to the judgment and correction of military readers of greater ſkill and experience.

IN dubious caſes, where better authority cannot be had, we are glad to have recourſe to mere precedents for information. This being

being my ſituation with regard to courts of enquiry, I am happy to meet with one of ſo much conſequence, as that which was held, by virtue of a ſpecial warrant from his late majeſty, to enquire into the failure of the expedition to the coaſt of France, in the year 1757. As this is the moſt remarkable court of enquiry that comes within my own knowledge, I ſhall inſert a copy of the warrant, by the authority of which it was held, together with an account of the proceedings of the court, in conſequence thereof, and then endeavour from theſe and other concomitant circumſtances, to aſcertain ſome ſort of regularity for the conduct of future courts of enquiry.

" GEORGE R.

" WHEREAS we were pleaſed, in Auguſt " laſt, to ſend a number of our troops on " an expedition againſt France, with orders " and inſtructions to attempt, as far as " ſhould be found practicable, a deſcent " upon the French coaſt, at or near Roch-

" fort,

"fort, in order to attack, if practicable, "and by a vigorous impreffion force that "place; and to burn and deftroy, to the "utmoft of their power, all docks, maga-"zines or arfenals, and fhipping, that fhould "be found there; and to exert fuch other "efforts, as fhould be judged moft proper "for annoying the enemy, as by our feve-"ral inftructions to the commander of the "faid forces does more fully appear: and "whereas the troops fent for thefe purpofes "are returned to Great Britain, no attempt "having been made to land on the coaft of "France; concerning the caufe of which "failure, we think it neceffary that enquiry "fhould be made, by the general officers "hereafter mentioned, in order that they "may report thofe caufes to us, for our "better information. Our will and plea-"fure therefore is, and we do hereby no-"minate and appoint our right trufty and "right entirely beloved coufin and counfel-"lor, Charles Duke of Marlborough, lieu-"tenant-general; our trufty and well be-

loved

"loved George Sackville, commonly cal-
"led Lord George Sackville, and John
"Waldegrave, major-generals of our for-
"ces, to examine and enquire touching the
"matters aforesaid. And you are to give
"notice to the said general officers, when
"and where they are to meet, for the said
"examination; and the said general officers
"are hereby directed to cause you to sum-
"mon such persons (whether the generals
"or other officers employed upon the ex-
"pedition, or others) as are necessary to
"give information, touching the said mat-
"ters, or as shall be desired by those
"who were employed on the expedi-
"tion; and the said general officers are
"hereby further directed to hear such
"persons as shall give them information
"touching the same; and they are autho-
"rised, empowered and required strictly to
"examine into the matters before men-
"tioned, and to report a state thereof as it
"shall appear to them, together with their
"opinion thereon. All which you are to
"transmit

"transmit to our secretary at war, to be by "him laid before us for our consideration, "and for so doing, this shall be as well to "you, as to our said general officers, and all "others concerned, a sufficient warrant."

"Given at our court at Kensing-
"ton, this first day of November
"1757, in the thirty-first year of
"our reign.

BARRINGTON."

"To our trusty and well beloved
"Thomas Morgan, Esq; judge
"advocate general of our forces,
"or his deputy."

Agreeably to the warrant, the three general officers therein named, attended by Sir Charles Gould, the (then deputy) judge advocate general, assembled, and opened their business with the examination of several witnesses and papers, relative to the intelligence in which the expedition was projected. They next summoned the generals,

nerals, and the other officers, who had been particularly employed during the expedition, in reconnoitring, &c. in order to judge of the practicability of putting his majesty's instructions in execution; and to learn what attempts had been made to execute these instructions, and then called upon Sir John Mordaunt, who was commander in chief of the troops on the expedition, to give his reasons for not having put his majesty's instructions and orders in execution; and lastly, they formed an opinion (which they reported to the king) concerning the causes of the failure of the expedition.

From hence we deduce, first, that the power of appointing courts of enquiry appears to be vested in the crown; and, that it should originate from thence, seems agreeable both to law and equity. For the king, being the supreme magistrate of the kingdom, and intrusted with the whole executive power of the law, no court whatsoever can have any jurisdiction, unless it

some

fome way or other derive it from the crown*; befides, as he is confidered as the generaliffimo, or firft in military command within the kingdom, and has the fole power of raifing and regulating fleets and armies †, he muft poffefs an indubitable right of taking fuch methods as he may judge proper, to examine into the conduct of his officers and foldiers, though not authorifed to adjudge any man to lofe life or limb, or even to receive corporal punifhment, unlefs by the fentence of a court martial. And further, as it is the prerogative of the crown to difmifs officers or foldiers, or any other fervants from its fervice, without any form of trial, fo far from objecting to the power of appointing courts of enquiry being lodged with the king, that whenever his majefty fhall condefcend to leave the examination of doubtful cafes to fuch a court, and take their opinion thereon, previous to the difmiffion of the fufpected perfon or perfons,

* Staunford's Pleas of the crown, p. 54, 55.

† Blackftone's Com. b. 3.

or the bringing of them before a court martial, where an offender riſks being puniſhed with more ſeverity, it may be regarded rather as a mark of his clemency, and a certain indication of his love of juſtice and equity.

If his majeſty then is authoriſed to appoint courts of enquiry, he may alſo delegate this power by his warrant or inſtructions to the lord lieutenant of Ireland, or other chief governor or governors there for the time being; or the governor or governors of Gibraltar, and any of his majeſty's dominions beyond the ſeas reſpectively; or the perſon or perſons there commanding in chief, to hold them in the kingdom of Ireland, and other places and dominions, as he is impowered to do with regard to courts martial*; and for the ſame reaſons it appears juſtifiable that this power ſhould be extended to the colonels or commanding officers of regiments or corps, to hold regimental

* Mutiny Act, art. 2.

courts

courts of enquiry, and to the commanding officers of forts, caftles, or barracks, or elfewhere, where the refpective corps under their command confift of detachments from different regiments; or if independent companies (as is directed with refpect to regimental and garrifon courts martial) to affemble garrifon courts of enquiry; fubjected however to reftrictions fomewhat fimilar to thofe attending regimental and garrifon courts martial*.

Secondly, as to the ufe and authority of courts of enquiry after their appointment, the original and principal intent of them appears to have been, to examine into fuch cafes as admitted of a doubt, whether there was a fufficiency of matter, or evidence againft any fufpected perfon or perfons, fo as to convict him or them before a court martial, and thereby prevent an unneceffary affemblage of that judicature, which is often attended with difficulty,

* Articles of War, f. 15, a. 12, 13, 14.

on account of the number required to form general courts martial, (requiſite in all capital caſes, and ſuch wherein officers are concerned) whereas courts of enquiry, according to the preſent cuſtom of the army, conſiſt of a much inferior number of members*; beſides, courts martial, by a too frequent

* The King of Pruſſia, with his uſual preciſion in military affairs, has been very particular in his regulations, with rank and number of officers to compoſe courts martial and courts of enquiry, viz. when the conduct of a field officer is to be examined into, the court of enquiry or examination is to conſiſt of the commandant of the regiment and one field officer; and if he is, in conſequence of the examination, to be tried by a court martial, the members to compoſe it muſt be a general officer as preſident, two lieutenants, two majors, and two captains. When a captain is to undergo an examination, one field officer, and one captain muſt be ordered on it; and if tried by a court martial, the members thereof muſt be a lieutenant-colonel as preſident, two majors, two captains, two lieutenants, and two enſigns; if his crime be capital, a colonel as preſident, two lieutenant-colonels, two majors, two captains, three lieutenants, and three enſigns. For a court of enquiry

quent uſe of them, in trivial matters, and ſuch as cannot be ſupported by evidence

enquiry or examination on a ſubaltern officer, one captain, and one ſubaltern; for his court martial, a field officer as preſident, two captains, two lieutenants, and two enſigns; and if his crime is capital, a lieutenant-colonel as preſident, two majors, three captains, three lieutenants, and three enſigns. For the examination of a non-commiſſioned officer, one lieutenant and one enſign; and for his court martial, one captain as preſident, two lieutenants, two enſigns, two ſerjeants, and two corporals; if his crime be capital, a field officer as preſident, three captains, three lieutenants, three enſigns, thee ſerjeants, and three corporals. For the examinatien of a private ſoldier, an old firſt lieutenant; and for his court martial, a captain as preſident, two lieutenants, two enſigns, two ſerjeants, two corporals, two lance-corporals, and two private men; if his crime is capital, a field offier as preſident, three captains, three lieutenants, three enſigns, three ſerjeants, three corporals, three lance-corporals, and three private ſoldiers.—N. B. When a non-commiſſioned officer or private ſoldier undergoes an examination on account of a capital offence, a captain and one non-commiſſioned officer ſhall be ordered for it, eſpecially if he has accomplices in his crime.

may (as is usual with most things) be by familiarity brought into contempt.

This seems to have been the intention of the court of enquiry appointed for examining into the causes of the failure of the expedition to the coast of France; for though the warrant does not authorise the members to enquire particularly into the conduct of any individual, yet as there could be no effect without a cause, if there appeared to have been an improper inaction of the troops, to whom could the cause thereof be imputed with so much propriety as to their commander, to whom the execution of the king's orders and instructions was intrusted. An enquiry, therefore, into the cause of the failure of the expedition, was, by implication, at least, an enquiry into the conduct of the commander; for which reason it appears doubtful, whether the power given by the warrant authorised them to call on Sir John Mordaunt, to give his reasons for not

not fulfilling his majeſty's inſtructions. For herein conſiſts one of the principal diſtinctions between a court of enquiry and a court martial; the latter is empowered to hear and examine witneſſes on oath, on both ſides, to put the priſoner on his defence, and to paſs ſentence on him, which is definitive; whereas, were a perſon ſuſpected of any criminal matter, to be previouſly examined by a court of enquiry, and afterwards brought to trial before a court martial, this examination (as Sir John Mordaunt very juſtly obſerved with regard to his own caſe, when upon his defence before the court martial, by which he was tried, in conſequence of the report of the court of enquiry) might in its tendency produce a charge againſt himſelf. Many courts of enquiry are ordered only to examine witneſſes to the point in queſtion, and not to give an opinion, but to leave it to the perſon by whoſe authority they are held, to judge from the facts laid down in the proceedings, whether there is a ſufficiency of

cause for bringing the matter to trial by a court martial; and indeed there appears some strong reasons in favour of this mode of proceeding, as the opinion of a court of enquiry might operate forcibly on that to be subsequently given by a court martial. In fine, it seems most advisable (for the power of courts of enquiry is entirely arbitrary, and not founded on any law, or even invariable custom) either not to call upon the suspected offender, or not to give an opinion; or in case an opinion is given by a court of enquiry, that opinion ought not to point out what were or were not the causes of the supposed ill conduct which occasioned the sitting of that court, but be simply, *whether there does or does not appear a sufficiency of cause to render a court martial necessary;* for though there may be *matter apparently sufficient* to make a farther investigation on oath proper, it does not follow that the individual or individuals who may be called to answer to an accusation are consequently culpable. No witness at a court

court of enquiry is ſworn as at a court martial, nor is any one obliged *legally* either to give his teſtimony, or plead before a court of enquiry. The perſon, therefore, whoſe conduct is to be enquired into, as well as his witneſſes, may have many things to plead, and give in evidence before a court martial, which they would not do before a court of enquiry.

Courts of enquiry may in ſome meaſure be regarded in the ſame light, in martial law, as grand juries are in the courts of common law; and the authority of grand juries extends no farther than enquiring, upon their oaths, whether there be ſufficient cauſe to call upon the party to anſwer it; and the finding of an indictment is only in the nature of an accuſation, which is afterwards to be tried and determined by the petty jury*, for which reaſon they only hear and examine the evidences on behalf

* Blackſtone's Commentaries, b. 4, p. 300.

of the profecution. And no indictor or grand-juror can be put upon a petty jury for the trial of the fame caufe, if challenged by the prifoner fo indicted: nay, if one of the indictors be returned upon the petty jury and does not challenge himfelf, he is liable to be fined*.

An extraordinary doctrine, with regard to courts martial, was advanced fome years ago by Mr. Pelham, in a debate in the houfe of commons. He obferved, that when an officer, either of the army or navy, was accufed of mifconduct, or even fufpected of any mifconduct, the method hitherto had been for his majefty to appoint a court martial at any time he thought fit, to enquire into fuch officer's conduct, upon fuch particular occafion; and when they had made a full enquiry, they either paffed fuch fentence as they thought juft, or they reported the whole matter to his majefty, and left to him the determination

* Hale's Hift. Plac. Coronæ, p. 309.

of

of what punishment he might think the officer deserved. But he seems to have confounded the authority of courts martial with that of the courts of enquiry, which, as is just observed, sometimes give an opinion, and sometimes do not, and yet not to have been very deeply versed in the knowledge of either. Special verdicts are often brought in, upon doubtful points of law arising from jurors, and the determination left to the judges, between whom the law makes this distinction, *De jure respondent judices, de facto jurati;* but such a verdict from the members of a court martial, in whom the characters of judge and juror are united, would be highly absurd.

But besides the uses already mentioned, courts of enquiry are often assembled to make surveys of, and examine into the quantity and quality of stores, provisions, cloathing, &c. to settle disputes between officers as well with regard to points of duty, as in private contentions, where there

is a doubt who is the aggreſſor; and in ſhort, finally to reconcile all differences that may ariſe in the courſe of ſervice; when it can be done without either party being charged with any thing criminal, ſo as to render a court martial neceſſary, in order to paſs ſentence and inflict puniſhment, to which the power of a court of enquiry does not extend; and courts of enquiry might, I ſhould think, be alſo made uſe of for ſearching into the foundation of complaints of inferior officers or ſoldiers, who may think themſelves wronged by their captains or other officers, for which commanding officers of regiments are required by the articles of war*, to ſummon regimental courts martial, in order to do juſtice to the complainant. For as no commiſſioned officer can be caſhiered, or diſmiſſed from the ſervice, except by order from the king, or by the ſentence of a general court martial †, if the complaint is

* Sect. 12, a. 2. † Sect. 15, a. 15.

found

found to be juſt, and of ſo heinous a nature, that the offender appears to deſerve caſhiering, this regimental court martial has not power to inflict the puniſhment adequate to the crime; where then is the uſe of ſummoning a court which cannot do juſtice to the complainant? Were the circumſtances of the complaint to be previouſly examined into by a court of enquiry, a judgment might be formed from their opinion, whether there was a ſufficiency of matter to bring the offender to trial, and a too-frequent and unneceſſary aſſembling of courts martial be thereby prevented.

FURTHER, there ſeems a greater propriety in a court of enquiry taking the inventory of the effects of a deceaſed officer, than the major of a regiment, or the officer doing the major's duty, being obliged to do it before a regimental court martial, as is the preſent practice, for he is now under the neceſſity of exhibiting proofs of his integrity before a court, *purpoſely* aſſembled for

for the trial of criminals (for the articles of war do not direct that a court martial shall be assembled for this business only, but that it shall be done before the *next* regimental court martial) and which in no other case is authorised to take cognizance of the conduct of *any* commissioned officer, much less of a field officer, who cannot be tried at a general court martial, by any officer under the rank of a captain.

It is much to be wished that courts of enquiry, which are now become an usual (and might be an essential) part of military jurisdiction, were regularly authorised, and their proper business pointed out by the articles of war, or rather by parliament, upon a future revision of the mutiny bill; and were they empowered to administer an oath to their members, and to such witnesses as are called upon to give evidence before them, (which they cannot at present do) it would add to their weight and dignity.

CHAP.

CHAPTER IV.

Of Regimental and Garriſon Courts Martial.

REGIMENTAL and garriſon courts martial are held by the ſame authority as general courts martial, but are not intruſted with ſuch extenſive powers, their juriſdiction being confined to the cognizance of ſmall offences only, for which they are empowered to inflict corporal and other inferior puniſhments; a power being inveſted in every commanding officer of a regiment or garriſon to aſſemble them; and the number of members required to compoſe them being much leſs than at general courts martial, they are more eaſily and leſs expenſively formed, and are therefore much more frequently held.

WITH regard to general courts martial, the mutiny act and articles of war are very explicit, both as to the number they ſhall conſiſt of, and the rank of the officers who are

are to compose them, it being expressly directed, that no general court martial shall consist of less that thirteen members* †, whereof none are to be under the degree of a commissioned officer; that the president shall not be under the degree of a field officer, unless a field officer cannot be had, in which case the next in seniority to the commander, not being under the degree of a captain, shall preside; and that no field officer shall be tried by any person under the degree of a captain ‡; and it is a general custom not to put subaltern officers (particularly those of but short standing in the army) on general courts martial, provided a sufficiency of field officers and captains can be conveniently assembled.

* Articles of War, s. 15, a. 12.

† In the Garrisons of Goree and Senegal, a general court martial may consist of any number, not less than five.

‡ Mutiny Act, p. 12. Articles of War, s. 15, a. 8, 9.

THUS

Thus provident, I ſay, have the laws been, concerning general courts marlial; but as to garriſon and regimental courts martial, the mutiny act is entirely ſilent, except in authoriſing the king to appoint them, and limiting their power and juriſdiction; and although the articles of war direct, that no regimental court martial ſhall conſiſt of leſs than five officers, (excepting in caſes where that number cannot be conveniently aſſembled, when three may be ſufficient), yet they give no ſort of inſtruction with reſpect to the choice of officers for this duty.

The general practice of the army, is to appoint a captain (when one is to be had) as preſident, and four ſubalterns, (or two, if more cannot be conveniently aſſembled) as members of a regimental court martial, and a regular roſter is kept by the adjutant for this, as for other regimental duties; every

every officer, therefore, will probably, in his turn, be a member of a regimental court martial. By this means it often happens, that very young officers, who are also very young men*, are ordered on this duty; and who, though possessed of very good natural abilities improved by a liberal education, have not a sufficient knowledge of the laws of their country, nor experience in military affairs, to direct them in their proceedings, and both I look upon to be essential to a member of a court martial, whether general or regimental; whether authorised to take cognizance of capital crimes, or merely confined to inferior faults and misdemeanors; for though I do not expect that officers of the army should make the deep and intricate distinc-

* By statute 7 and 8 William III. c. 32, infants under twenty-one years of age may be challenged as jurors.

tions

tions of law a part of their ſtudies, yet it ſurely muſt be allowed, that thoſe who not only judge of the guilt of a criminal, but are alſo to aſcertain the mode and meaſure of his puniſhment, ought not to be entirely ignorant of the municipal laws of the land, by many of which they muſt be guided, even in the adminiſtration of martial law. Sir William Blackſtone ſtrongly recommends, and fully demonſtrates the utility of ſome acquaintance with the laws of their country, to almoſt every ſect and profeſſion, but more particularly to thoſe who intend to profeſs the civil and eccleſiaſtical law, in the ſpiritual and maritime courts, and who would wiſh to act with ſafety and prudence as judges; and I ſhould think we may, with great propriety, add thoſe who are to proceed according to martial law in military courts, where they are both judges and jurors, and are to be kept within due bounds by the eſtabliſhed laws of the realm.

BUT

But to return to regimental and garrifon courts martial, in particular. Befides the inconveniences I have already mentioned, they are deprived of the affiftance of a judge advocate, a perfon judged fo effential to a general court martial; it therefore behoves the prefident (who from his rank may generally be fuppofed to be an officer of fome experience) to direct and advife his members in their proceedings, fo as to prevent their deviating from either the martial law, or the fundamental laws of their country; for their decifions are liable to be examined into, in either cafe; in the firft, by an appeal to a general court martial, by either party who may think himfelf aggrieved; and in the fecond, for irregular proceedings, by a court of law, in like manner with general courts martial.

Wherever the law is vague, it opens a vaft field for innovation; this being the cafe with regard to regimental courts martial, commanding officers of regiments have taken

taken great latitude. It has been cuſtomary, *occaſionally*, to admit the adjutant to ſit on regimental courts martial; but this ſeems contrary to law, equity, and common ſenſe. The adjutant is to a regiment, in many reſpects, what a ſheriff is to a county; he is the perſon who is to ſuperintend the execution of every judgment, and the inflicting of every puniſhment; and ſo cautious has the law been, of not lodging the legiſlative and executive power in the ſame hands, that although the ſheriff is the principal conſervator of the peace in his county; yet, by the expreſs directions of *Magna Charta**, he is forbidden to hold any pleas of the crown, or in other words, to try any criminal offence; for it would be very unbecoming, that the executioners of juſtice ſhould alſo be the judges; ſhould one day condemn a man, and perſonally inflict the aſſigned puniſhment the next. Neither may a ſheriff act as an ordinary juſtice of

* Chapter 17.

the

the peace, during the time of his office*; for this would be equally inconsistent, he being in many respects the servant of the justices. How far these regulations are applicable, with respect to an adjutant, is left to the judgment of my military readers.

The law says, if an officer, in punishing a criminal, happens to occasion his death, it is only misadventure, for the act of correction was lawful, (provided he does not exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment), but it seems doubtful, should death ensue upon the inflicting of a punishment by an adjutant, who had sat as one of the judges, whether it would be regarded in this light.

There is another circumstance relative to regimental courts martial, which also seems worthy of remark; I mean that of

* Satute, 1, m. Statute, 2, c. 8.

holding

holding what are usually called *Field Courts Martial*; that is, assembling a proper number of officers immediately upon the spot, who examine into the matter in a summary manner, and pass sentence, which is instantly executed, without any record or register of their proceedings being made. On actual service, where immediate examples are often required, such irregularity (for in such cases it cannot be deemed injustice) may be deemed necessary, *inter arma silent leges*; but this will not hold good in times of profound peace, when the proceedings against offenders will admit of the legal and necessary delays.

Custom may perhaps be urged on this occasion, and in favour of other matters relative to the present mode of proceeding at regimental courts martial, which I have made some animadversions on; but when a custom is even proved to exist, the next enquiry is into the legality of it; for if it is not a good and legal custom, it ought to be

be no longer uſed, *malum uſus abolendum eſt*, is an eſtabliſhed maxim of law*.

In the courſe of a debate in the houſe of commons, on the mutiny bill, in the year 1753, the late Lord Egmont moved, that the members of regimental courts martial, as well as the witneſſes called before them, ſhould be ſworn; but the motion was over-ruled; but as they are expected to act upon honour, they are equally bound to proceed with candour, and decide with juſtice. And as the members of a general court martial are ſworn not to divulge the ſentence of the court, until it ſhall be approved by his majeſty, or thoſe delegated by him; nor diſcloſe the vote or opinion of any particular member of the court, ſo it alſo behoves the members of regimental and garriſon courts martial to act with ſecrecy and circumſpection.

* Littleton, 212.

THE

The rules and inſtructions already laid down, and thoſe which may hereafter be pointed out, for the regulation of courts martial, are chiefly intended for general courts martial, but are applicable in moſt circumſtances to regimental and garriſon courts martial, with ſuch diſtinctions and exceptions, as muſt be evident to every intelligent reader.

CHAPTER V.

Of Appeals.

Having in the former chapter mentioned appeals from regimental to general courts martial, I ſhall now proceed to conſider the nature, as well as the extent of them.

From its having been enacted and declared by the 12th clauſe of the mutiny act, that no officer or ſoldier being acquitted or

convicted of any offence, ſhould be liable to be tried a ſecond time by the ſame or any other court martial, for the ſame offence, unleſs in the caſe of an *appeal* from a regimental to a general court martial, doubts have ariſen with reſpect to the nature and extent of appeals. To fix their proper bounds is a matter of a very delicate and intereſting nature, as well with regard to the ſoldier, as the ſervice. Should it be underſtood that appeals are of right due in all caſes, much inconvenience might enſue, as conſcious offenders would be induced to appeal, merely for the ſake of delaying puniſhment, and would be moſt apt to do ſo, when there was either an impracticability or great difficulty of convening a general court martial; and yet on the other hand, it may not be eaſy, *definitively* to point out in what inſtances they ought to be allowed or refuſed. As a matter of legal right, it appears plainly, that an appeal from a regimental to a general court martial is given *only* in the caſe deſcribed in the

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2d article of war, of the 12th ſection, where any inferior officer or ſoldier, who ſhall think himſelf wronged by his captain, or other officer commanding the troop or company to which he belongs, is to complain thereof to the commanding officer of the regiment, who is authoriſed to ſummon a regimental court martial, and from which either party may, if he thinks himſelf ſtill aggrieved, appeal to a general court martial. For the 12th clauſe of the mutiny act, whereby it is declared and enacted, that no officer or ſoldier, being acquitted or convicted of any offence, ſhall be liable to be tried a ſecond time by the ſame or any other court martial, for the ſame offence, unleſs in the caſe of an appeal from a regimental to a general court martial, mentions ſuch appeals, only by way of exception, and uſes no affirmative enacting words, which can of themſelves confer any power or right of appeal, but muſt have reference to ſome poſitive proviſion, by which ſuch appeal is expreſsly given; and ſince there is no men-

tion of an appeal in any other part of the ſaid act, nor among the articles of war in any other than the 2[d] article of the 12th ſection, recourſe muſt be had to this, to ſatisfy the implication of the ſaid clauſe, and the conſtruction will then be natural, that the appeal of an inferior officer or ſoldier who ſhall think himſelf wronged by his captain, or other officer, &c. is the caſe there intended.

In civil proceſs brought into the ſeveral courts of law, there is a gradual ſubordination from one to the other, the ſuperior courts correcting and reforming the errors of the inferior; but as it is contrary to the genius and ſpirit of the law of England to ſuffer any man to be tried twice for the ſame offence in a criminal way, eſpecially if acquitted upon the firſt trial, the criminal courts may be ſaid to be independent of each other; at leaſt ſo far, as that the ſentence of the loweſt of them can never be controuled or reverſed by the higheſt juriſ-

diction

diction in the kingdom, unlefs for error in matter of law, apparent upon the face of the record, though fometimes caufes may be removed from one to the other before trial.

The fame caution has been adopted in the military code of laws, as may be feen by the claufe of the mutiny act in queftion; appeals from regimental to general courts martial being the only exception, and thefe appeals confined to one particular cafe, which may be confidered, in fome meafure, in the nature of a civil procefs, and rather calculated for procuring redrefs to the foldier, than for punifhing the officer. For an officer may, through miftake, yet without intention of oppreffion, do acts whereby a foldier may think himfelf aggrieved, and againft which he may be well warranted in feeking a remedy, and ftill there may be no ground for proceeding criminally againft the officer.

It however muſt be obſerved, that even theſe appeals carry danger with them; for the latter part of the article of war ſays, "If upon a ſecond hearing, the appeal ſhall appear to be *vexatious* and *groundleſs*, the perſon ſo appealing ſhall be puniſhed at the diſcretion of the general court martial."

The regimental court martial which is required to be ſummoned, for doing juſtice to the complainant, may be truly ſaid to be in the nature of a civil proceſs, for it has not authority to puniſh either the complainant or the officer complained of; a commiſſioned officer not being amenable before a regimental court martial: all the juſtice then that they can do, is to declare their opinion, how well or ill grounded the complaint is; but ſhould either party ſtill think himſelf aggrieved, and appeal to a general court martial, and the appeal appear to that court martial to be *vexatious* and *groundleſs*, the perſon ſo appealing, whether plaintiff or defendant, is liable to puniſhment at the diſcre-

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tion of the ſaid general court martial. Here then ceaſes all analogy to a civil proceſs, and indeed renders the latter part of this article one of the moſt exceptionable in the whole code.

Every thing that can be done in a caſe of this ſort, by a regimental court martial, comes within the cognizance of a court of enquiry; and by the examination before a court, totally diveſted of every power to inflict puniſhment, the moſt diſtant idea of a ſecond trial for the ſame offence, ſo repugnant to the laws of England, and ungrateful to the ear of an Engliſhman, would be removed.

The report of the court of enquiry might, like the verdict of a grand jury, be a foundation for bringing either party, who appeared to have acted *criminally*, before a court of criminal juriſdiction.

SHOULD a non-commiſſioned officer or ſoldier be brought before a regimental court martial, for mutiny, deſertion, or any other crime, cognizable only by a general court martial, he may refuſe to plead to it, (their juriſdiction being expreſsly confined to ſmall offences), and inſiſt upon being tried by a general court martial; nay, even ſhould he plead, and the regimental court martial proceed to paſs ſentence, he may appeal to, and has nevertheleſs a right to be tried by, a general court martial. For a priſoner, by pleading before an improper judicature, cannot eſtabliſh, in the court, a juriſdiction which the legiſlature hath withholden, nor give any ſanction to their proceedings; but he may at any time claim, and aſſert his right of being brought before *that* court, which has the full and proper cognizance of his crime, and ſo much the rather, as the perſons who labour under theſe circumſtances are in general *illiterate* and *unadviſed* of the moſt regular time for taking their exception, nor will the prohibition of a ſecond trial

trial affect this case. For the proceedings of the regimental court martial, as not being founded in law, are totally void, and those of the general court martial become original, without any consideration or retrospect had to the sentence of the regimental court martial. But this may be rather deemed a plea to the jurisdiction of the court, (which shall be more fully explained hereafter) than an appeal.

As the court of king's bench, which is the highest court of common law, takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace, and indictments from all inferior courts may be removed into it, by writ of *certiorari*, so may general courts martial judge of all military crimes, from the highest to the lowest; and it may be often expedient to bring causes of an inferior nature, and which are cognizable by a regimental or garrison court martial, before a superior court; but each

case must depend upon its own peculiar circumstances.

In the latter part of that clause of the mutiny act, which provides against officers and soldiers being liable to be tried a second time by the same or any other court martial, for the same offence, unless in the case of appeal from a regimental to a general court martial, it is enacted, that no sentence given by any court martial, and signed by the president thereof, be liable to be revised more than once; and even the privilege of one revision has been condemned, upon the principle that no man's life should be twice brought in danger for the same supposed crime. But this may be rather deemed an appeal to the same court than a new trial, since the same persons only are to re-consider what they have already done, without any new judges being added to them, or new witnesses produced. Juries are often sent back to reconsider their verdicts. The very best-disposed

posed men may occasionally err, and be happy, upon reflection and re-consideration, to correct that error. With such men no risk can be run upon a revision; they cannot be led to swerve from the solemn oath they have taken, to judge *without partiality, favour, or affection*: bad men are as liable to be led away at first as at last. Another reason may be offered in vindication of this sort of appeal or revisal; points of law may arise in the course of the proceedings of a court martial, which the judge advocate, much less the members, may not be adequate judges of, and they may consequently fall into legal errors, which, when pointed out to them, they will joyfully correct. And here I shall take an opportunity of remarking on the distinction made in the oath taken by the president and members of a general court martial, and that of the judge advocate. The former are sworn, not only to conceal the vote or opinion of each particular member, but also the sentence of the court, until it shall be

approved by his majesty, or by some person duly authorised by him*; the latter is only sworn not to divulge the opinion of any particular member of the court martial. Should every member be at liberty to reveal the sentence previous to its being approved of, or ordered to be revised, or a judge advocate take advantage of the omission of his oath, which distinguishes it

* It might be deemed improper to break the thread of my text, in order to offer my sentiments on that part of the oath of a member of a general court martial, which enjoins him to secrecy with respect to the sentence of the court, until it shall be approved by his majesty, or some person duly authorised by him, having uniformly, throughout this treatise adhered to the letter of the law, as it stands at present; but I hope to be excused for expressing (in a note) my feelings for the officers of the army, who are the only subjects of the British empire composing courts of criminal jurisdiction, whose verdicts are indefinite and of no avail, unless approved of by other authority. Naval courts martial, like juries in courts of law, give their opinion *instanter*, and in open court, and that opinion is absolute and conclusive.

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from the other, it might, in the caſe of a reviſal, *in particular*, occaſion inferences to be drawn, and jealouſies raiſed of undue influence, as in the inſtance of a ſentence and puniſhment, which were known publicly to have been the original ones, being altered on a reviſal, though theſe alterations may in fact ariſe merely from a legal error being pointed out to the court. But, as was juſt now obſerved, doubts may ariſe with reſpect to points of law, which it may be neceſſary to ſearch into, and regulate, by taking the advice of counſel learned in the law, before the approving officer puts his *fiat* to a ſentence. Whom then can he employ with ſo much propriety on this occaſion, as the judge advocate, whoſe oath has given him a latitude (which may and ſhould occaſionally be made uſe of) of divulging the opinion of the court, even before it is approved of?

CHAP.

CHAPTER VI.

Of the Duties of a Judge Advocate.

A JUDGE ADVOCATE may be faid to be the main fpring of a court martial, for on him the court depends for information, concerning the legality, as well as regularity of their proceedings; if then *he* errs, all may go wrong. Military men in general, not being fuppofed to be verfed in law, the judge advocate is directed by the articles of war* to inform; this is (as I humbly conceive is thereby meant) to explain any points of law † that may occur in the courfe

* Section 15, a. 6.

† It may perhaps appear, at firft, a contradiction to fay, that a judge advocate is to explain points of law to the members of a court martial, after having declared that the articles of war and mutiny act, which are the fundamental laws on which courts martial proceed, are fo plain as to be eafily underftood by military men; but it muft be obferved, that it is in the method of proceeding, which is in great

course of the proceedings, in order to prevent the members, at the time that they endeavour to act with equity, from proceeding illegally. For altho' the laws of England most justly may be said to be founded on equity, it must be universally allowed, that they are not so plainly laid down, but that a man with the most equitable intentions may inadvertently swerve from them.

But this, though a very essential part of a judge advocate's business, is not the only one; besides the information the court have a right to expect in points of law from him, he has also to perform the office of clerk or register of the court, as likewise to be prosecutor or counsel for the crown; and it

great measure to be regulated by that of the courts of law, and concerning the greater part of which the mutiny act and articles of war are silent, that members unacquainted with the law are liable to err, and wherein the assistance of a judge advocate is requisite, which rather confirms than contradicts what I have already asserted.

seems

ſeems to be generally expected, that he ſhould aſſiſt the priſoner in his defence. This laſt part of his duty (if it really is a part thereof) muſt have ariſen merely from cuſtom, for I know of no authority for it, in either the mutiny act or articles of war; nor is it a part of the inſtructions uſually given from the crown to judge advocates. Neither can I diſcover any example of a ſimilar nature in the courts of common law, on which it can be founded. If it takes its riſe from the rule, that the judges are always to be of counſel with the priſoner, to ſee that he has law and juſtice*, this aſſiſtance ſhould rather come from the members of the court martial who are in fact his judges. I would not however be underſtood to inſinuate, that the judge advocate ſhould totally deny the priſoner his aſſiſtance, and thereby take every advantage of the ſuperior knowledge he may be generally ſuppoſed to poſſeſs, in matters of this

* 3 Inſt. 137. Hawkins's Pleas of the Crown, b. 2, c. 30, ſ. 7.

nature;

nature; particularly on the trials of private ſoldiers, and ſuch who may endanger their cauſe, merely from want of ability and knowledge how to defend themſelves: ſhould any points of law or doubt ariſe, the members, as well for their own ſatisfaction, as to do juſtice to the priſoner, have a right to call upon the judge advocate for information; neither does it ſeem incompatible with the other parts of his duty, that he ſhould aſſiſt a priſoner (particularly one under the circumſtances juſt mentioned) by pointing out to him the proper mode of ſupporting his cauſe and making his defence; but that he ſhall firſt proſecute the priſoner, and then, *Proteus-like*, change ſides, and furniſh him with means and arguments to overthrow thoſe he has before made uſe of, on the part of the crown, ſeems inconſiſtent with juſtice and common ſenſe. No counſel is allowed to a priſoner, upon trial, for any capital crime, in a court of law, unleſs ſome point of law ſhall ariſe, proper to be

be debated*; but counsel, or at least *amici curiæ*, have been allowed to prisoners at courts martial, in all cases.

But, abstracted from this last piece of business, it is evident, from what has been said, that a judge advocate, in order to do justice to the trust reposed in him, should, besides being thoroughly master of every particular relative to martial law, be well acquainted with the form of trials in criminal cases, where the king, whose counsel he is, is always a party concerned, and in a great measure, with the municipal laws of his country.

And a knowledge of these matters is not the only requisite to form a judge advocate. Impartiality, which is necessary in every member of a court martial, is peculiarly so in him; he should be particularly careful, not to let one part of his business prejudice him in the conduct of another, nor

* Hawkins's Pleas of the Crown, p. 400.

lead

lead him to endeavour to bias the court, by any ambiguous explanation of the law, or other matters; truth and equity ſhould be moſt conſpicuouſly ſeen at all courts martial, but chicanery never permitted to enter the door; his being proſecutor for the crown muſt not induce him to omit any thing in the records of the court that may be of ſervice to the priſoner; neither is he on the other hand to let his maſter's cauſe ſuffer, and a criminal eſcape unpuniſhed, through lenity, or any other motive whatever; but in the proſecution, though he ſhould act with ſpirit and reſolution againſt daring and hardened offenders, yet he ought to be cautious, not to injure or oppreſs, and much more, not to add inſult to ſeverity. In all caſes, where misfortune is interwoven with guilt, he ſhould make it appear that a deteſtation of the crime, and a regard to the public ſafety and ſervice, are not inconſiſtent with pity to the man, particularly to offenders, for the firſt time; to ſuch whoſe crimes are ſmall, whoſe tempta-

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tions were powerful, and who appear to have been ſeduced by others.

In a court of law, where the king is a party concerned, (as he is in all caſes at courts martial) previous to the jury being ſworn, he is, by his counſel, to challenge or except againſt any juror; and it is the buſineſs of a judge advocate, as proſecutor for the crown, to do the ſame at a court martial.

The nature of challenges I ſhall conſider more particularly in the ſecond part of this work, and only now make a few remarks on an opinion that has been entertained, that a priſoner has not a right to challenge a member of a court martial without aſſigning reaſons for ſo doing; and that if thoſe reaſons do not appear ſufficient to the court, the perſon ſo challenged has a right to ſit as a member on the trial. An inſtance of this ſort happened on the trial of Lord George Sackville, who excepted againſt General

General Belford; and having, by desire of the court, given his reasons for it, they were adjudged to be insufficient, and the general desired to take his place; but he, with great propriety, declined sitting as a member on the trial. I am much at a loss to imagine what gave rise to this method of proceeding; it cannot be founded on authority, for it is diametrically opposite to the practice of all the courts of law in the kingdom*; neither do the articles of war, nor the mutiny act, give any sanction to, or even make the least mention of it, as it could not naturally be supposed that a court martial would de-

* By the common law of England, though jurors may be challenged, the judges or justices cannot; but in the courts where the proceedings are carried on, according to the civil and canon law, the judges, who, like the members of courts martial, are also judges of facts, may be challenged.— And they commonly, of their own accord, decline sitting as judges in a cause where they may be supposed to be under the least bias or partiality to one side or the other.—1 Coke's Inst. fol. 294, 677.

prive

prive a prisoner of a privilege he is entitled to in every other court.

I HAVE heard it said, that the objecting to an officer, as a member of a court martial, without assigning any cause, is a reflection upon his character as a man of honour, but this notion is founded on a wrong principle. A respectable tradesman, or even a gentleman of rank and fortune in a county, is never regarded in a worse light, for having been challenged without a cause, as a juror. For there are many objections to be made, where life, liberty, and property, are at stake, besides his being of ill fame, as will plainly appear, when I come to speak of the causes, which the law allows to be good challenges. I have only therefore to add, that it is certainly an unjust and illegal restriction on a prisoner, and must have proceeded from a bad custom, founded on an erroneous principle, and the sooner it is abolished the better*.

THERE

* Since the publication of the first edition of this treatise,

There are indeed some particular crimes which a prisoner being tried for, in a court of law, is not allowed to challenge peremptorily or without cause, such as high treason or misprision of treason; it being enacted by 33 Henry VIII. 23. pl. 3. that it should not be allowed in those cases; but by the 1 Philip and Mary 10. such challenges were revived as to treason; however, as neither of these come under the denomination of military crimes, I know of no case, where members of a court martial may not be challenged peremptorily.

If the right of challenging twenty peremptorily be allowed of, at a court martial, and a prisoner avails himself of it to

treatise, I have met with frequent instances of challenges by prisoners, brought before courts martial, and have always had the satisfaction, upon submitting the matter to the court, whether the prisoner should shew cause, to have a majority in favour of the opinion I have now advanced, and endeavoured to support.

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the full extent, many inconveniences may arise in small garrisons, where there are not a sufficient number of officers to admit of it; and yet to obviate it, I am rather at a loss. For I am very averse to taking away any privilege from a criminal at a court martial, that is enjoyed in any other court. As there is no great probability of such a thing happening, except in the case of some obstinate fellow, who may do it merely to delay his trial, by a proper remonstrance from the judge advocate, he may perhaps be persuaded to decline his challenges, or at least part of them; but should this not have the desired effect, and there is no opportunity of getting officers from the neighbouring garrisons; in this case, if in any, his challenges might be over-ruled, without he shews good cause for them; but this arbitrary method of proceeding should be practised with the greatest caution, and not made a precedent, except in the like cases of exigency.

A PROPER

A PROPER regulation of this matter, by authority, is amongſt the *deſiderata* of military men, with reſpect to the proceedings of courts martial.

THE adminiſtering of the neceſſary oath to the members being alſo a part of the judge advocate's duty, I ſhall take this opportunity of making my obſervations on the preſent method of their being ſworn in. In a court of law, the judges are ſworn but once, which is on their appointment as ſuch; and on this, it is to be ſuppoſed, is founded the cuſtom of ſwearing the members of a court martial but once, although they try ſeveral different priſoners. However, as they ſupply the place, not only of judges, but alſo of jurors, (who, in a court of law are ſworn on every different trial, though the jury conſiſts of exactly the ſame men), I ſhould think that it would be a more regular and legal method of proceeding, if courts martial were to obſerve the ſame. For there is the ſame reaſon that the mem-

bers ſhould be ſworn on every different trial, as the witneſſes; and in fact, the form in which the judge advocate tenders the oath to them, is expreſsly confined to the ſingular number in the word *matter**, and formerly in that of *priſoner* alſo.

Were all the priſoners appointed to be tried by a court martial brought into court, and arraigned of their ſeveral crimes, previous to the court's being ſworn in, for the trial of any particular cauſe, and upon their being put upon their challenges, made none, or conſented to be tried by the ſame members, and the oath adminiſtered by the judge advocate in the plural, inſtead of the ſingular number, it might ſave both time and trouble, and yet anſwer the ſame purpoſe; but to alter the form of an oath eſta-

* "You ſhall well and truly try and determine "according to your evidence in the *matter* now be- "fore you."—Mutiny Act, ſect. 5. Articles of War, ſ. 15, a. 6.

bliſhed,

blished, not only by the crown, but by act of parliament, is a power not vested in any court whatever.

PREVIOUS to a trial, the judge advocate should collect the witnesses, who are to give evidence on the part of the crown, and also afford intimation to the prisoner of the time appointed for his trial, and furnish him with a true copy* of the crime or crimes he is accused

* Although it is usual to let the prisoner have an exact copy of the crime or crimes laid to his charge, yet on the trial of Lieutenant-general (then Major-general) Monkton, for the charge preferred against him by Major Campbell, (of which he was most honourably acquitted) the general, upon hearing the crimes that were exhibited against him, in the king's warrant, observed to the court, that the copy of the charge, which had been given him by the secretary at war, some time before, and against which he had prepared his defence, differed from that now read in court, and therefore begged that the former charge might be read; but the court gave it as their opinion, that the complainant be at liberty to prosecute the charges as stated in his majesty's warrant, to which

accufed of; and as the charge exhibited againft a prifoner is in the nature of a bill of indictment from a grand jury in a court of law, which is in general very explicit and particular, as to the manner, time, place, &c. in which the crime is faid to have been committed, fo fhould the particular inftances of mifbehaviour, &c. which are intended to be produced againft a prifoner at a court martial, be affigned, and fully fet forth in the charge, in order that he may provide his witneffes, and prepare his defence. And it would not be improper for the prifoner to give in the names of fuch perfons as he means to call upon as witneffes, in cafe they are officers, to prevent them, as well as the

which Major-general Monkton muft neceffarily anfwer; and that, if in the courfe of his defence, it fhould be material for him to fhew, either that there was any fubftantial variation between the prefent charge, and that originally exhibited, or that the latter indicated any greater degree of malevolence, or for any other purpofe, conducive to his defence, it might then be proper to lay the firft charge, with his anfwer to it, before the court.

evidences

evidences for the crown, from being members of the court martial; for although, in a court of law, it ſeems agreed, that it is no exception againſt a perſon's giving evidence for or againſt the priſoner, that he is one of the judges or jurors who are to try him, as on the trial of one *Hacker*, in the reign of King Charles II.* two of the perſons in the commiſſion for the trial came off from the bench, and were ſworn and gave evidence, and did not go up to the bench during the trial, being judged by the court to be good witneſſes; and as to the jurors, the preſent practice, which now univerſally prevails, is, that if a juror knows any thing of the matter in iſſue, he may be ſworn as a witneſs, and give his evidence publicly in court †, but not in private before his brother jurors. Yet, as members of a court martial act in the united capacity of judges and jurors, and the judges

* Keeling's Report of divers Caſes, p. 12.

† Blackſtone's Com. b. 3, p. 375.

who quitted the bench, in order to give evidence, did not return to it during the trial, it might create doubts, whether members, who left their places and became witnesses, could again resume the function of judges in the same cause; but the names of the witnesses on each side being previously given in, would prevent even the shadow of a difficulty.

It may perhaps happen, in the course of a trial, that circumstances will arise which were not expected by one or other of the parties, and render other witnesses necessary, who may be members of the court. It is impossible to guard against unforeseen accidents, but there is the less risk of such happening, by appointing (if possible) such officers for the court martial, as were at some distance, and most probably had no previous connection with, or knowledge of the matter in question, which would also be the most certain method of preventing partiality to one side or the other; but should it so happen, notwithstanding

ing these precautions, that a member of the court is found to be an essential evidence to either party, as the investigation of truth is the principal object of a court martial, it seems most equitable and just, that the practice, with regard to jurors, should, on this occasion *at least*, be adopted in preference to that with respect to judges; and that such member be sworn as a witness, and after giving his testimony in open court, be allowed to assume his former station as a member. In the case of *Hacker*, alluded to above, although two of those in the commission for the trial did not return to the bench, there still remained other judges to pass sentence, which in most cases is positively defined by the law, and not left to the direction of a judge; whereas, by martial law, the mode and manner of punishment to a criminal, is almost as often left to be decided by the members of a court martial, as the determination of his guilt; and therefore, by preventing a member from resuming his place, as such, the

parties concerned will be deprived of a vote in both, which will often make an effential difference in a court, where every point is decided by a majority of voices.

CHAPTER VII.

Of the Diftinction between Principals & Acceffaries, & the Means & Method of bringing Offenders to Trial.

THE means and method of bringing offenders, whether principals or acceffaries, to trial, not being the immediate bufinefs of the members of a court martial, though conducive to it, I have judged it more methodical to treat of thefe matters here, than to blend them with their proceedings, after the court is appointed and formed; and firft, of the diftinction between the principals in, and acceffaries to a crime.

HAVING then premifed that where a felony is committed by divers perfons, the fame man

man may be both principal in, and accessary to it*, as where A. incites B. to commit a crime, and afterwards joins with him in the fact, I shall proceed to shew,

1. When he may be deemed a principal.

2. When an accessary.

It was anciently † the more prevailing opinion, that those only were to be judged principals in felony ‡, who actually did the fact; as in murder, those only who gave the mortal blow; in rape, those only who actually ravished the party, &c. and that those in company, who were only present, and abet-

* Hale's Pleas of the Crown, 219. Kellway's Reports, 107.

† Plowden's Comment. 996.

‡ The reader will observe, that I have particularly selected the cases relative to felonies, they being the chief capital crimes that a court martial takes cognizance of, for under that head I rank mutiny, desertion, &c.

 ted

ted and encouraged the doing of it, were to be deemed acceffaries, or at moft principals in the fecond degree only; but according to the prefent practice, all thofe who affemble themfelves* together with a felonious intent, the execution whereof caufes either the felony intended, or any other, to be committed; or with an intent to commit a trefpafs†, the execution whereof caufes a felony to be committed, and continuing together, abetting one another, till they have actually put their defign in execution; and alfo thofe who are prefent‡ when a felony is committed, and abet the doing of it, as by holding the party whilft another ftrikes, or by moving him to ftrike, or delivering§ a weapon to him who ftrikes, are principals in the higheft degree, in refpect of fuch abetment, as much as the per-

* 11 Henry IV. 13, pl. 30.

† Hale's Pleas of the Crown, 216, 217. Staunford's Pleas of the Crown, 40, let. D. E.

‡ 2 Inftitute, 182.

§ Hale's Pleas of the Crown, 216.

fon

ſon who does the fact, which, in judgment of law, is as much the act of them* all, as if they had all actually done it; and if there were malice † in the abetter and none in the perſon who ſtruck the party, it will be murder in the abetter, and only manſlaughter in the other.

In like manner any ſoldier, who ſhall perſuade another to deſert the ſervice, or to commit any other crime, contrary to the military code of laws, will perhaps be found more deſerving of puniſhment than he who actually commits the crime. By the third article of war of the ſeventh ſection, any commiſſioned or non-commiſſioned officer, commanding a guard, who ſhall knowingly and willingly ſuffer any perſon whatever to go out to fight a duel, ſhall be puniſhed as a challenger; and all ſeconds, promoters, and carriers of challenges, in order to duels,

* Plowden's Commentaries, 98, 100.

† Hawkins's Pleas of the Crown, b. 1, c. 31, ſ. 49 to 54.

ſhall be deemed as principals, and be puniſhed accordingly.

It is ſufficient* in general to make an abetter a principal, that the perſon who does the fact is encouraged and emboldened to it, from the hopes of preſent and immediate aſſiſtance, from the abetter, whether he be within view or not of the fact†.

Those who by accident are barely preſent, and are merely paſſive, and neither any way encourage it, nor endeavour to hinder it, or apprehend the offenders, ſhall neither be judged principals nor acceſſaries, yet if they be of full age, they are highly puniſhable for their negligence, both in not endeavouring to prevent‡ the felony, and in not endeavouring to apprehend the offender;

* Hawkins's Pleas of the Crown, b. 1, c. 29, ſ. 8.
† Hale's Pleas of the Crown, 216, 217.
‡ Dalton's Country Juſtice.

and

and if they in any way ſhewed an aſſent* to the felony, they may be puniſhed as principals in it, becauſe the ſhewing ſuch aſſent could not but give encouragement to it.—By both the act for puniſhing mutiny and deſertion, &c.† and the articles of war‡, in caſes of mutiny, it is made a capital crime, for any officer or ſoldier, who, being preſent, does not uſe his utmoſt endeavours to ſuppreſs the ſame; or coming to the knowledge of any mutiny or intended mutiny, does not, without delay, give information thereof to his commanding officer.

2. In what caſes a man is to be deemed an acceſſary.

It muſt be obſerved that the law makes a difference between an acceſſary before,

* 108 Noy's Rep. 537. Staunford's Pleas of the Crown, 217.

† Art. 1.

‡ Sect. 2, art. 4.

and

and an acceſſary after the fact. As to thoſe who may be deemed acceſſaries before, it is agreed*, that whoever by hire, command, counſel or conſpiracy, and who by ſhewing† an expreſs liking, approbation, or aſſent to another's felonious deſigns, abet and encourage him to commit it, but are ſo far abſent‡ when he actually commits it, that he could not be encouraged by the hopes of any immediate help or aſſiſtance from them, are all of them acceſſaries before the fact, both to the felony intended, and to all other felonies which ſhall happen in and by the execution of it, if they do not expreſsly retract and countermand their encouragement§ before it is actually committed.

If the felony‖ be the ſame in ſubſtance

* 2 Inſt. 180. Hale's Pl. of the Crown, 217.

† Inſt. 182. Plowden's Comment. 475, 6.

‡ Staunford's Pl. of the Crown, 40, let. D. E.

§ 3 Inſt. 51. Hale's Pl. of the Crown, 127, 218.

‖ Plowden's Comment. 4756. 2 Hale's Hiſt. Pl. Cor. 617.

which

which was intended, and varies only in ſome circumſtances, as in reſpect to the time or place at which, or the means whereby, it was committed, the abetter of the intent is altogether as much an acceſſary as if there had been no variance at all between it and the execution of it; as when a man adviſes another to kill ſuch a one in the night, and he kills him in the day; or to kill him in the fields, and he kills him in town; or to poiſon him, and he ſtabs him: or, if a ſoldier adviſes another to deſert at one time, and he does it at another; or to betray one gate of a town to the enemy, and he betrays another.

But if a man commands or adviſes another to commit a particular felony, and he commits another*; as to burn the houſe of A. and he burns that of B.; or to ſteal an ox, and he ſteals a horſe; or one ſoldier incites another to deſert, and he mu-

* Hale's Pleas of the Crown, 217. Plowden's Comment. 475.

tinies;

tinies; he is not an acceſſary, becauſe the act done varies in ſubſtance from what was commanded or incited.

He who barely conceals a felony which he knows to be intended, is guilty only of miſpriſion of felony, and ſhall not be judged an acceſſary, ſays Sir William Staunford*; but by the articles of war, in the caſe of mutiny, the barely concealing of it is made capital, as was juſt now obſerved.

Now, with regard to thoſe caſes, wherein a man may be deemed an acceſſary after the fact: he may be deemed ſuch, by receiving one who was an acceſſary before, as well as by receiving a principal †. Any aſſiſtance ‡ whatſoever given to one known

* Pleas of the Crown, 37, let. C.

† Staunford's Pleas of the Crown, 43, let. D.—Lambard's Juſtice of the Peace, b. 2, c. 7, f. 291.

‡ 2 Inſtitute, 183.

to

to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, will make the receiver an accessary after the fact; as where one assists another with money or victuals, to support him in his escape; or where one harbours or conceals in his house* a felon under pursuit, by reason whereof the pursuers cannot find him; and much more, where one harbours in his house, and openly protects such a felon, by reason whereof the pursuers dare not take him. It is however necessary that a man know † of the felony, in order to make him an accessary, by receiving that felon.

Any person who shall be accessary to desertion, by harbouring, concealing, or assisting any deserter from his majesty's service, knowing him to be such, is liable upon conviction, by the oath of one or more credible witnesses, before any of his majesty's

* Hale's Pleas of the Crown, 218.
† Staunford, 4, let. E.

justices

justices of the peace, to a fine of five pounds, to be levied by distress and sale of the goods and chattels of the offender; and in case of a default of sufficient goods and chattels, he is to be committed to the common goal, there to remain without bail or main-prize, for the space of three months, or be publicly whipped, at the discretion of the justice*.

In regard to the trial of accessaries, it must be observed, that if one man charged with being a principal is acquitted † of the crime, another charged with having been an accessary to it, shall be discharged; for in law, *ubi factum nullum, ibi fortia nulla*‡.

With respect to the means and method of bringing offenders, whether principals or accessaries,

* Act for punishing Mutiny & Desertion, a. 25.
† Hale's Pleas of the Crown, 221.
‡ 4 Coke's Rep. 436. Staunford's Pleas of the Crown, 47, let. F.

accessaries, to trial; according to the ordinary practice of the courts of law, they must be, first, arrested or apprehended; secondly, imprisoned or discharged, upon bail; thirdly, indicted*.

And offenders against martial law are to be dealt with nearly in the same manner; for, in the first place, all officers, both military and civil†, are authorised to apprehend them; and secondly, the articles of war‡ direct, that whenever any officer or soldier shall commit a crime deserving punishment, he shall, if an officer, be put in arrest by his commanding officer; if a non-commissioned officer, or soldier, be imprisoned till he shall be either tried by a court martial, or shall be lawfully discharged by a proper authority; and though the articles of war do not make mention of an offender being admitted to bail, yet a cus-

* Hale's Hist. Plac. Cor. c. 10.
† Act for punishing Mutiny, &c. art. 51.
‡ Sect. 15, art 17.

tom

tom has been long introduced into the army, that when the accusation against an officer is not of a capital nature, he is generally allowed to be in arrest *at large;* that is, to walk about within certain limits, without a sword: for, as imprisonment, previous to conviction, is only for safe custody, and not for punishment, in this dubious interval, between the commitment and trial, a prisoner ought to be used with the utmost humanity; nor need he be subjected to other hardships than such as are absolutely requisite for the purpose of confinement only, unless where he is unruly, or has attempted an escape*.

The length of confinement should be considered, as well as the severity of it; and the articles of war† direct, that no confinement shall continue more than eight

* 2 Institute, 381. 3 Instit. 34. Blackstone's Com. v. 4, p. 297.

† Sect. 15, art. 18.

days,

days, or till ſuch time as a court martial can be conveniently aſſembled. A privation of liberty is of itſelf far from a trifling puniſhment, particularly when attended with ſeverity. It ought, therefore, to be made of as ſhort duration, and of as much eaſe to a priſoner, as poſſible; for as every man has a right to be ſuppoſed innocent, until he is legally convicted, we ſhould do all in our power to avoid the riſk of puniſhing the guiltleſs.

LASTLY, with regard to indictments, the martial law knows of no ſuch mode of proceeding, unleſs, as was before obſerved, the opinion of a court of enquiry may be allowed in ſome meaſure to be the ſame.

PART II.

Of the Manner of proceeding against Offenders.

CHAPTER I.

Of Arraignment and its Incidents.

HAVING in the former part shewn what methods are to be taken to bring an offender against martial law to trial, I shall now endeavour to explain in what manner he is to be proceeded against after his being brought into court; and first, of his arraignment.

ARRAIGNMENT means the calling the offender to the bar of the court, to answer the matter he is charged with*; and in doing which the law directs†, (and indeed

* Hale's Hist. Pl. Coronæ, c. 28.

† Hawkins's Pl. of the Crown, b. 2, c. 28, f. 1.

common

common compaſſion points out to us) that every perſon ought to be uſed with all the humanity and gentleneſs which is conſiſtent with the nature of the thing; and under no terror or uneaſineſs than what proceeds from a ſenſe of his guilt, and the misfortune of his preſent circumſtances; and therefore ought not to be brought to the bar in a contumelious manner, though charged with the higheſt crimes*, as with his hands tied together†, or any mark of ignominy and reproach, nor even with fetters on his feet‡, unleſs there be ſome danger of an eſcape or reſcue.

Upon the arraignment of a criminal in a court of law, he is called upon to hold up his hand while the indictment is read to him; but at a court martial this ceremony is not required; nor indeed in a court of

* Hale's H. P. C. c. 28.

† Bracton de legibus et conſuetudinibus Angliæ, b. 3, f. 137.

‡ Idem.

law

law is it indifpenfable; for if the prifoner refufes to hold up his hand, but confeffes he is the perfon named, it is fully fufficient*. The crime of which he ftands accufed is then diftinctly read to him, and the queftion *guilty* or *not guilty* put to him by the judge advocate, when he will either *ftand mute*, or *confefs* the fact; which circumftances may be called *incidents* to the arraignment; or he will plead to the indictment or charge. The feveral pleas a criminal may make ufe of fhall be treated of in the next chapter; but firft, I fhall confider thefe incidents to the arraignment, viz. *ftanding mute*, and confeffion.

1. Of ftanding mute.

If a man, being put upon his trial, fays nothing at all, in cafes of felony, the court ought, fays Lord Chief Juftice Hale†, *ex*

* Blackftone's Comment. b. 4, c. 25.
† Hale's Hift. Pl. Cor. 317.

officio, to empannel a jury, and ſwear it, as an inqueſt of office, to enquire whether he ſtands mute, *ex viſitatione Dei*, (of the act of God) or of malice.

In like manner, if a priſoner be brought before a court martial, and ſtands mute, the preſident and members might be ſworn to make the ſame enquiry.

If it be found to be of the act of God*, the court† are to enquire whether the priſoner

* 2 Hale's H. P. C. 317. Hawkins's Pl. of the Crown, b. 2, c. 30, ſ. 7.

† As it is rather uncommon to meet with criminals who ſtand mute (what the law terms) by the act of God, I ſhall inſert a remarkable inſtance of one, who may very juſtly be ſaid to have done ſo. A deſerter from the Pruſſian ſervice being unexpectedly overtaken by thoſe ſent in purſuit of him, whilſt he was merry-making with ſome peaſants, the ſudden ſurpriſe had ſuch an effect on him, that after having made a loud cry, on the firſt aſſault, he became quite ſtupified, and ſuffered himſelf to be led

ſoner be the ſame perſon; and all other matters touching the felony which he might have pleaded in his defence; for ſince it is not his fault that he did not plead, there is no reaſon why his trial ſhould be in a more looſe and ſummary manner, or any way leſs regular or ſolemn than if he had. But whether judgment of death can be given againſt ſuch a priſoner, who hath never

led away, without making the leaſt reſiſtance; and when he was brought to trial, could not be prevailed upon, by any means, to ſpeak a ſingle word. He was as immovable as a ſtatue, and did not appear even to comprehend any thing that was ſaid or done to him. Being afterwards committed to priſon, he neither eat, drank, nor ſlept; nor had any manner of evacuation. Neither threats, promiſes, nor prayers, could draw an anſwer from him, but he ſtill remained motionleſs, as if deſtitute of all ſenſation. At laſt, his irons being knocked off, he was led out, and deſired to go where he would, but he neither could ſtir hand nor foot, nor comprehend what was doing to him; and after ſpending twenty days in this ſtate, he at laſt fell down dead.

pleaded, and can say nothing in arrest of judgment, is a point yet undetermined*.

As to a prisoner's standing mute of malice, he may be said to do so, when, upon being arraigned, he makes no answer at all; answers impertinently, or foreign to the purpose; or refuses to put himself upon his trial as the law directs†. But after a man hath confessed himself guilty, or pleaded, and put himself upon his trial‡, he shall not be deemed to have stood mute on account of his subsequent silence; but the trial shall proceed, and the like judgment be given as in common cases.

As to the consequence of standing mute of malice, by the 33 Henry VIII. 1. 2. it is enacted, that notorious felons, who are openly of ill fame, and will not put themselves in inquests of felonies, shall have strong

* 2 Hale's P. C. 317.
† Hawkins's Pleas of the Crown, b. 2, c. 30, s. 1.
‡ Hale's P. C. 225.

and

and hard imprifonment, as they who refufe to ftand to the common law of the land; but this was not to be underftood of fuch prifoners as were taken upon flight fufpicion.

THE judgment of *peine forte et dure*, or ftrong and hard punifhment, as recited by Hale* was, "That he be fent to the prifon from whence he came, and put into a dark lower room, and there be laid naked upon the bare ground, upon his back, without any cloths or rufhes under him, or to cover him, except his privy parts; his legs and arms drawn and extended with cords to the four corners of the room, and upon his body laid as great a weight of iron as he can bear, and more; and the firft day he fhall have three morfels of barley bread, without drink; the fecond day he fhall have three draughts of water, of ftanding water next the door of the prifon, without bread, and this to be his diet till he die†.

BUT

* Hale's Hift. Pl. Cor. 219.

† It may feem extraordinary, that any man fhould fubject

But to the credit of the preſent age, this ſevere

ſubject himſelf to torture and ſudden death, rather than put himſelf upon trial, by which means he might have a poſſibility, however ſlight, of eſcaping puniſhment; and if he ſhould be convicted, an eaſy death would be his only ſuffering: although ſome few may act thus, *merely* from obſtinacy and caprice, (an inſtance of which occurred lately at Kingſton aſſizes) yet the more probable cauſe in general ſeems to be a regard to their poſterity; their landed property, in caſe of ſtanding mute, being preſerved to them, whereas upon a conviction of felony it becomes forfeited. Theſe circumſtances were particularly exemplified in the caſe of a Mr. Calvery, of a good family in the north of England, who, being a man of violent paſſions, conceived a jealoſy againſt his wife, which, by ſome unfortunate accident, was turned to ſuch a frantic rage, that early one morning he murdered her, by ſplitting her ſkull with his battle-axe, and forced ſeven children ſhe had by him, to leap off the battlements of his caſtle, into the moat which ſurrounded it, where they all ſtuck faſt in the mud, and were ſuffocated with the ſlime on the water; he then mounted his horſe and galloped towards a farmer's cottage, where one of his children, an infant at the breaſt, was at nurſe. Whilſt upon the road,

ſevere mode of proceeding, from which not even

road, he was ruminating in gloomy and horrid ſatisfaction upon the approach of the only matter wanting to the final completion of his zealous revenge, the moon on a ſudden was darkened, he loſt himſelf in the midſt of a thick foreſt; the thunder of heaven, which now ſtunned his ears, ſeemed to war againſt him, and ſummon him to judgment; and the pale lightning, appalling his ſoul, was to his frantic imagination the fire of hell, preparing puniſhment intolerable, and tortures excruciating to millions of ages. He ſtopped, relented, repented; ſurrendered, and ſubmitted himſelf to juſtice. After having made his peace with heaven for the murder of his wife and children, he was agoniſed by the thought of his having deprived the child thus reſcued from his danger, even by the immediate interpoſition of Providence itſelf, of the eſtate and dignity of its anceſtors, and of leaving it, inſtead of its due inheritance, poverty, and the infamy of ſuch a father. He conſidered, that when convicted, his eſtate muſt go to the crown; if he, with his own hand, ſhould anticipate the ſtroke of juſtice, it muſt alſo become forfeited; he therefore ſtood mute, upon being arraigned, and ſubmitted with ſatisfaction to the penalty attending that behaviour, and perſevered in bearing the moſt excruciating pain, with the

even a peer of the realm was exempted, was laid aside by authority, it being enacted by a statute of the 12th George III. ch. 20. that any persons standing mute upon their arraignment for felony or piracy, and not directly answering to such felony or piracy, shall be convicted thereof, and the conviction have all the same consequences in every respect, as if such persons had been convicted by verdict or confession of such felony or piracy, and judgment had been thereupon awarded.

2. In regard to confession; it may be either express or implied.

An express confession is, when a prisoner directly confesses* the crime he is charged with, which is the strongest conviction that can

patience of a proto-martyr, and thereby preserved his estate for the child.

Upon this tragical tale is founded a play called the Yorkshire tragedy, supposed by some to have been written by Shakespeare.

* Staunford's Pleas of the Crown, 142, let. C.

can be, and may be received* after the plea of *not guilty* is recorded, notwithstanding the repugnancy.

Upon a plain and simple confession, the court has nothing to do but to award judgment; but is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead †; for in cases where life is at stake, the court should be very tender in giving judgment too hastily. And where a person, upon his arraignment, actually confesses himself† guilty, or unadvisedly discloses the special matter‡ of the fact, supposing that it doth not amount to felony, whereas it really does, yet the judges, upon probable circumstances that such confession may proceed from fear, menace, or duresse; or from

* Keeling's Rep. of div. Cases, p. 11.

† Hale's H. P. C. 225. Blackstone's Commentaries, b. 4, p. 324.

‡ 11 Henry VI. c. 65.

 weakness

weaknefs or ignorance, may refufe to record fuch confeffion, and fuffer the perfon to plead *not guilty*.

An implied confeffion is when a defendant, in a cafe not capital, doth not directly own himfelf guilty, but in a manner admits of it, by yielding to the king's mercy, and defiring to fubject himfelf to a fmall punifhment; in which cafe, if the court think fit to accept of fuch fubmiffion, and make an entry that the defendant *pofuit fe in gratiam regis*, without putting him to a direct confeffion or plea, the defendant fhall not be eftoped * to plead *not guilty* to an action for the fame fact, as fhall be where he abfolutely † pleads guilty.

* 9 Hen. VI. 60. a.
† Idem.

CHAP.

CHAPTER II.

Of the several Pleas a Criminal may make use of.

THE most usual plea upon the araignment of a prisoner who neither stands mute, nor confesses, is that of *not guilty*, or *the general issue*, upon which plea alone the prisoner can receive his final judgment of death; and whatever special matter a man may have to offer in his justification, it cannot be put in by way of plea, but he must plead the general issue, *not guilty*, and give this special matter in evidence, which if true, must in effect amount to the general issue, and render the person not guilty, as clearly and effectually, as if it were or could be specially pleaded*.

But there are special pleas, in the bar of the charge, which perhaps the prisoner may avail himself of, such as that of *autre fois acquit*; that is to say, that he has already

* Blackstone's Com. b. 4, p. 333.

been tried and acquitted of the crime he ſtands accuſed of; or that of *autre fois, attaint or convict*; that is, having already been attainted or convicted thereof; which are called pleas, in bar of the (indictment or) charge, and are certainly ſufficient pleas to entitle him to be diſcharged, if he can produce the record* of his acquittal or conviction, or even good evidence to prove it; for a man ſhall not be brought in danger of his life † for one and the ſame offence more than once; nor ſhall an officer or a ſoldier ‡,

* The original proceedings of all general courts martial are lodged in the judge-advocate-general's office in London, and any perſon may obtain an authenticated copy of any particular trial, upon application, and paying the ordinary charges; and the caſe recited in the text ſhews the neceſſity of the original proceedings of all regimental and garriſon courts martial being preſerved by the proper officers of the reſpective regiments and garriſons in which they are held.

† Staunford's Pl. of the Crown, 101, let. E.

‡ Act for puniſhing mutiny and Deſertion, &c. art. 10.

convicted

convicted or acquitted of *any* offence, be liable to be tried a second time by the same or any other court martial for the same offence, unless in the case of an appeal from a regimental to a general court martial. But the acquittal* of a man as a principal, is no bar to a subsequent prosecution against him, as an accessary after the fact, because such acquittal clears him only of the charge of having committed the fact, which being a crime entirely different from that of receiving him who committed it, there seems no more reason that the acquittal of it should bar a prosecution for the receipt, than if they were offences that bore no manner of relation to one another †. But it is holden in many books ‡ of authority, that the acquittal of a man as principal, is a good bar to a subsequent prosecution of him as an

* Hale's P. C. 244.

† Hawkins's P. C. b. 2, c. 35, s. 11.

‡ Staunford's Pleas of the Crown, 44, let. C. 105, let. A. B. Hale's P. C. 244.

accessary

accessary before, for such an accessary is in some measure guilty of the fact, and therefore an acquittal, which clears a man from being guilty of the fact, doth consequently clear him from being such an accessary; yet in some books* it is holden, that a man who hath been acquitted as a principal, may be tried again as an accessary before, as well as after.

It is however agreed, that an acquittal † of a man as an accessary, either before or after, is no bar to a subsequent prosecution against him as a principal ‡.

Lastly, a pardon may be pleaded in bar, as at once destroying the end and purpose of the indictment or charge, by re-

* Keilword's Rep. 107.
† Crompton's Just. of Peace, 43, 30.
‡ Idem. Hawkins's Pleas of the Crown, b. 2, c. 35, s. 12.

mitting

mitting that punishment which the prosecution is calculated to inflict*.

With regard to these several special pleas in bar, it will be necessary to observe, in general, that although, in civil actions, when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another, if that be determined against him. Yet in criminal prosecutions, *in favorem vitæ*, when a prisoner's plea in bar is found against him, still he shall not be concluded or convicted thereon, but he may, notwithstanding, plead the general issue, *not guilty*†. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it may be inflicted; viz. on the general issue, after an impartial examination and decision of the facts‡.

* Blackstone's Comment. b. 4, p. 331.

† 2 Hale's P. C. 239.

‡ Blackstone's Com. b. 4, p. 332.

There

There is ftill another plea, which may be fometimes made ufe of by a prifoner, viz. a plea to the jurifdiction; that is, where an indictment is taken before a court that hath no cognizance of the offence; as if a man be indicted for a rape at the fheriff's tourn, or for treafon at the quarter feffions; in thefe, or fimilar cafes, he may except to the jurifdiction of the court, without anfwering at all to the crime alleged*; and in like manner, if a regimental or garrifon court attempt to take cognizance of mutiny or defertion, or any capital crime, their jurifdiction† being exprefsly confined to fmall offences; or a general court martial, of which fome of the members are under the degree of captains, proceed to the trial of a field officer‡; or the prefident in any cafe is under the degree of a captain, an exception may be made to their jurifdiction.

* Blackftone's Comment. p. 327.
† Articles of war, f. 15, a. 12.
‡ Act for punifhing Mutiny, &c, a. 4.

By

By the laſt* article in the code of military laws, courts martial are authoriſed to take cognizance of all crimes, *not capital*, and all *diſorders and neglects*, which officers and ſoldiers may be guilty of, to the prejudice of good order and military diſcipline, which are not enumerated in the foregoing articles, and puniſh them at their diſcretion; and upon the authority of this article, it has been too much the cuſtom in the army to try ſoldiers by court martial for thefts and other crimes, cognizable before the courts of law; altho' it ſeems queſtionable, whether an exception might not, in many caſes of this ſort, be made to their juriſdiction. For the mutiny act† and articles of war‡ expreſsly direct, that any officer, non-commiſſioned officer, or ſoldier, who ſhall be accuſed of any capital crime, violence, or offence againſt the perſon, eſtate, or property of any of his majeſty's ſubjects, which is puniſhable by the laws of the land, ſhall be delivered over

* Art. of War, ſ. 20, a. 3.
† Art. 62. ‡ Sect. 11, a. 1.

to

to the civil magiſtrate, by the commanding officer, under the penalty of being caſhiered in caſe of his refuſal.

There was formerly an article (but latterly omitted) that particularly authoriſed courts martial to take cognizance of all ſoldiers accuſed of ſtealing from their comrades. This is a ſpecies of theft (and the only one) that ſhould come before a military court, not only from its tendency to a breach of good order and diſcipline, but becauſe the plaintiff or proſecutor would, under the like circumſtances, be amenable before the ſame judicature; whereas in thoſe committed by ſoldiers on citizens, the caſe is widely different, a court martial having no power over the latter, and therefore cannot put them on ſuch a footing; a court of law then, having equal juriſdiction over both, ſeems to be the juſt and legal place of trial for all other thefts, and ſuch like crimes committed by ſoldiers, againſt the municipal laws of the land.

CHAP.

CHAPTER III.

Of Challenges.

PREVIOUS to the prefident and members being fworn, the judge advocate is to recite to the feveral prifoners the names of thofe who are appointed for their judges, in order that they, as well as the judge advocate himfelf, as counfel for the crown, may challenge fuch (if there be any) as they would except againft; for no juror* can be challenged †, either by the king or prifoner, *without confent*, after he hath been fworn, whether on the fame day, or on a

* The term juror may be juftly applied to a member of a court martial, as well as to a juryman in a court of law, being derived from the latin verb *juro*, to fwear; from hence thofe fworn on a trial are called jurors. I fhall therefore ufe the word indifcriminately, except where I have occafion to make a diftinction between a member of a court martial and a juryman in a court of law.

† Yelverton's Reports, 25. Coke upon Littleton, 158.

former,

former, on the same trial, unless it be for some cause that happened since he was sworn. Challenges are of two kinds, viz. 1. Without any cause shewn, which are commonly called peremptory challenges. 2. With cause shewn; the nature of each of which I shall consider separately; and

1. Challenges without cause shewn, or peremptory challenges. By the common law, the king might challenge peremptorily, as many as he thought fit, of any jury returned to try a cause in which he was a party; but this is remedied by 33 Edward I. commonly called an ordinance for inquests, by which it is enacted as follows: "Of inquests to be taken before any of the justices, and wherein our lord the king is a party, howsoever it be, it is agreed and ordained by the king and all his council, that from henceforth, notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king; "yet

"yet such inquests shall not remain un-"shaken, for that cause; but if they that "sue for the king will challenge any of "those jurors, they shall assign for their "challenges a cause certain, and the truth "of the same challenge shall be enquired "into, according to the custom of the "court."

However, if the king challenge a juror, in a court of law, before the pannel is perused*, he need not shew any cause till the whole pannel is gone through, and it appears that there will not be a full jury without the person so challenged; and if the defendant, in order to oblige the king to shew cause, challenges *tous paravailles*†, yet it hath been adjudged, that the defendant shall be first put to shew all his causes of challenge, before the king need shew any.

* Staunford's Pleas of the Crown, 162, let. A. State Trials, v. 2, 274, v. 3, 52, 869.

† State Trials, v. 2, 52. Raymond's Reports, 473, 474.

By the common law alſo, a priſoner tried for felony was allowed to challenge as many as he thought fit, under the number of three full juries, *i.e.* not amounting to more than thirty-five; but by 22 Hen. VIII. 14. pl. 7. it is enacted, and by 32 H. VIII. 3. made perpetual, that no perſon arraigned for felony, &c. be admitted to any peremptory challenge, above the number of twenty.

Anciently, if a priſoner challenged peremptorily above the number allowed, he was to be treated as one who ſtood mute, or be adjudged to ſuffer death; but if he challenges above twenty, as the law ſtands at this day, he ſhall not have judgment of death, but only his challenge ſhall be overruled, and the jurors ſworn.

2. Challenges for cauſe.

Having premiſed that it is a general rule*, that wherever the king is a party, (as he

*Coke upon Littleton, 158, a. State Trials, v. 3, 235.

he is at all courts martial) he who challenges for cause must shew it presently, and not have time till the pannel is perused, as the king shall, where he takes a challenge; and that after a prisoner hath challenged a juror for cause, and his cause hath been disallowed, or found against him, he may challenge* the same juror peremptorily, before he is sworn. I shall proceed to shew what are allowed by law to be good challenges, when the prisoner challenges for cause.

THERE are many causes for which a juror in a court of law may be challenged, such as want of freehold, non-residence in the country, &c. which cannot happen at a court martial, but I shall confine myself to such as may occur therein.

FIRST, by 25 Edward III. c. 3. "No in-
"dictor, shall be put in inquests, upon the
"deliverance of indictees of felonies, if he
"be challenged for that same cause by him

* 37 Henry VI. 8, 17.

"who is so indicted." And this exception against a juror, that he hath found an indictment against the party for the same cause, hath been adjudged good, not only on the trial of such indictment, but also upon the trial of another indictment or action, wherein the same matter* is either in question, or seems to be material, though not directly in issue. Members of a court of enquiry (which I have already observed, may in some measure be compared to a grand jury) may therefore, by this statute, be challenged and excepted against, as members of a court martial, held either for the same cause, or upon the trial of another action, wherein the same matter is in question or happens to be material, though not directly in issue, as is expressed in the statute, if they have given an opinion, as they are sometimes directed to do. And in cases of appeal from regimental to general courts martial, the same reasons will hold good

* 8 Henry IV. 2, pl. 4. Coke upon Littleton 157, 6.

against

againſt any member of the former being one of the judges on the latter.

SECONDLY, It hath been adjudged a good cauſe of challenge on the part of the priſoner, that the juror hath a claim* to the forfeiture which ſhall be cauſed by the party's conviction †; or that he hath declared his opinion ‡ beforehand that the party is guilty, or will be hanged, or the like; but the priſoner ſhall not examine a juror concerning ſuch matter upon a *voir-dire* § (*veritatem dicere*) *i. e.* oblige him to anſwer upon oath to ſuch queſtions as the court ſhall de-

* State Trials, v. 1, fol. 502.

† An officer, upon conviction, is frequently liable to a forfeiture of his commiſſion, which the next officer for promotion may be ſaid to have a claim to; but whether or not this circumſtance ſhould be admitted as a juſt cauſe of challenge againſt ſuch officer, I do not pretend to lay down as law, but only offer it as a quere.

‡ 21 Henry VII. 29, pl. 10. State Trials, v. 4, fol. 184, 185.

§ 49 Edward III. 1, pl. 2.

mand of him*, because it sounds in reproach. And it hath been adjudged †, that if it shall appear, that the juror made such declaration from his knowledge of the cause, and not out of any ill will to the party, it is no cause of challenge. Neither is it a good cause of challenge, that the juror hath found others guilty on the same indictment, for the indictment is in judgment of law, several against each defendant, for every one must be convicted by particular evidence against himself.

Jurors may be challenged for suspicion of bias or partiality, which may be either a principal challenge, or to the favour. A principal challenge is such, where the cause assigned carries with it *prima facie*, evident marks of suspicion, either of malice or favour; as, that a juror is of kin to either party within the ninth degree ‡; that he

* Blackstone's Comment. v. 3, p. 332.
† 2 Rolle's Abridg. 657, let. I.
‡ Finch, 401.

has

has been arbitrator on either ſide; that he has an intereſt in the cauſe; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the ſame cauſe. All theſe are principal cauſes of challenge, which, if true, cannot be overruled; for jurors muſt be *omni exceptione majores.* Challenges to the favour are, where the party hath no principal challenge, but objects only to ſome probable circumſtances of ſuſpicion, as acquaintance and the like*.

The law alſo allows infamy to be a good cauſe of challenge, particularly if the juror hath been convicted of treaſon, felony, perjury†, &c. but theſe exceptions cannot well occur at a court martial; and beſides, none of them are principal challenges, (though perhaps allowed by favour, upon

* Blackſtone's Com. v. 3, p. 363.

† Coke upon Littleton, 158, a. Trials per pais. c. 9.

ſtrong preſumptive proof) unleſs the record of conviction be produced or ſhewn.

The different parties having gone through their challenges, both peremptorily and with cauſe, the court may then be ſworn, and proceed to examine the witneſſes.

CHAPTER IV.

Of Evidence and Witneſſes.

HAVING premiſed, that it is a ſettled rule, that in caſes of life no evidence * is to be given againſt a priſoner, but in his preſcence, I ſhall conſider,

First, How many witneſſes are required in criminal caſes.

Secondly, What is to be allowed as evidence.

* State Trials, v. 4, f. 277, 310.

Thirdly,

THIRDLY, Who may be witneſſes, and who are exempted from being ſo.

FOURTHLY, In what manner the witneſſes are to give their evidence.

As to the firſt point, viz. How many witneſſes are required in criminal caſes. Before the 1 Edward I. no certain number of witneſſes were required upon the trial of any criminal whatever*; but by that ſtatute, and the 1 and 2 Philip and Mary 10. two witneſſes are required, in caſes of treaſon; and in caſes of felony alſo, it ſeems to be the preſent practice in courts of law, as well as at courts martial, to procure two or more witneſſes, if they can be had; but when more cannot be found, one poſitive evidence to facts, and indeed ſtrong preſumptive proof, has been often deemed ſufficient to condemn a criminal, though he abſolutely denies the fact; but then it muſt be very warily allowed, ſays

* Keble's Rep. part 3, 68. pl. 7.

Lord Chief Juſtice Hale*; for it is better five guilty perſons ſhould eſcape unpuniſhed, than one innocent perſon ſhould die. *Tuties ſemper eſt errare, in acquietando, quam in puniendo; ex parte miſeracordiæ, quam ex parte juſtitiæ.*

2. WHAT is to be allowed as evidence in criminal caſes.

EVIDENCE is of two kinds; either that which is given in proof, or that which a jury may receive by their own knowledge. The former, or proofs, (to which, in common ſpeech, the name of evidence is uſually confined) are either written or *parol*, that is, by word of mouth. Written proofs or evidence are 1. Records; and 2. Ancient deeds of thirty years ſtanding, which prove themſelves; but 3. Modern deeds, and 4. Other writings, muſt be atteſted and verified by parol evidence of witneſſes; and

* Hale's Hiſt. Plac. Cor. 289, 290.

the

the general rule that runs through all the doctrine of trials is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed. For if it be found that there is any better evidence existing than is produced, the very not producing it is a presumption, that it would have detected some falsehood that at present is concealed*.

POSITIVE proof is always required, when from the nature of the case it appears, that it might possibly have been had. But next to *positive* proof, *circumstantial* evidence, or the doctrine of *presumptions* must take place. For when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances, which either *necessarily* or *usually* attend such facts; and these are called *presumptions*, which are only to be re-

* Blackstone's Comment. v. 3, p. 368.

lied on till the contrary be actually proved. *Stabitur presumptioni, donec probitur in contrarium**. *Violent* presumption is many times equal to full proof, for there those circumstances appear which *necessarily* attend the fact; and *probable* presumption, arising from such circumstances as *usually* attend the fact, hath also its due weight; but *light* or rash presumptions have no weight or validity at all †.

The confession of the defendant himself, whether taken upon an examination ‡ before justices of the peace, in pursuance of the 1 and 2 of Philip and Mary 13. or of the 2 and 3 Philip and Mary 10. or taken by the common law, before a secretary of state, or other magistrates, for treason, felony, or other crimes, not within these statutes; or in discourse with pri-

* Coke upon Littleton, 373.
† Blackstone's Com. v. 3, p. 371.
‡ Hale's Pleas of the Crown, 102, 262.

vate

vate perſons*, hath always been allowed to be given in evidence againſt the party confeſſing†, but not againſt others‡: however, it is an eſtabliſhed rule, wherever a man's confeſſion§ is made uſe of againſt him, it muſt be all taken together, and not by parcels.

DEPOSITIONS taken by a witneſs before a juſtice of the peace, may, at the pri-

* Dyer's Rep. 215, pl. 50.

† However averſe courts of Juſtice may be from receiving the confeſſion of a priſoner (*a*) yet, upon the trial of Lord Audley, for a rape and ſodomy, on being ſhewn his own examination, taken before the lord keeper, lord treaſurer, lord marſhal, and others, ſubſcribed by himſelf, he declined at firſt acknowledging it, ſaying his eyes were bad; but it being read to him, he then acknowledged it; upon which the lord ſteward (lord Cooper) adviſed him not to deny things which were clearly proved (*b*), for then the lords would give leſs credit to what elſe he ſaid.

(*a*) *Vide p.* 152. (*b*) *State Trials, v.* 1, *p.* 260.

‡ State Trials, v. 3, ſ. 89.

§ Hawkins's Pl. of the Crown, b. 2, c. 46, ſ. 5.

ſoner's deſire, be read at the trial, in order to take off the credit of the witneſs, by ſhewing a variation between ſuch depoſitions, and the evidence given in court *viva voce*; and for the ſame reaſon, where a witneſs, at one trial, varies from his own evidence at another, in relation to the ſame matter*; ſuch variance may alſo be given in evidence to invalidate his teſtimony at the ſecond trial.

THE examination of an informer, taken upon oath †, and ſubſcribed ‡ by him before juſtices of the peace, upon the commitment for any felony, may be given in evidence at the trial, for the ſame felony, if it be made by oath, to the ſatisfaction of the court, that ſuch informer is dead §, or unable to travel ‖, or kept away by means or

* State Trials, v. 2, f. 343; 528.

† Idem, v. 1, f. 265.

‡ Hale's Pleas of the Crown, 262, 263.

§ Hale's P. C. 262.

‖ Keeling's Rep. of div. Caſes, 55.

procurement

procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the justice, without any alteration whatever; but it is not sufficient to authorise the reading such an examination, to make oath, that the prosecutors have used all their endeavours to find the witness, but cannot find him*.

WITH regard to *hearsay* evidence, what a stranger † has been heard to say, is, in strictness, no manner of evidence for or against the prisoner, not only because it is not upon oath, but also because the other side hath no opportunity of a cross examination, and therefore should never be made use of, but only by way of indictment or illustration of what is properly evidence; yet what a prisoner ‡ hath been

* Keeling's Rep. of div. Cases, 55.

† State Trials, v. 2, f. 332, 414, 761, 802, v. 3. f. 145, 209.

‡ Idem, v. 3, 254.

heard to ſay at another time, may be given in evidence, in order either to invalidate or confirm the teſtimony which he gives in court.

The compariſon of hands is no evidence* of a man's handwriting, in any criminal caſe, whether capital or not, except the papers are found in the cuſtody of the perſon; but where in the cuſtody of another, it is no evidence; yet, undoubtedly, the teſtimony of witneſſes, well acquainted with the party's hand, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury†.

It is evident, from what has been ſaid, how averſe the courts of law are to the admiſſion of depoſitions or other written papers, or hearſay, as evidence, when *viva voce* witneſſes can be procured; and it behoves

* State Trials, v. 3, f. 892.

† Blackſtone's Comment. v. 4, p. 352.

hoves courts martial to be equally cautious; but their jurifdicton being limited to military perfons, they have no authority to fummon any others as witneffes; whereas, in a court of law, there is a procefs to bring them in, by writ of fub-pœna; and from this want of power in courts martial, they are often obliged to give greater latitude to fuch fort of evidence; however, their credibility is left to the court.

Words are generally to be underftood in their ufual and moft known fignification; not fo much regarding the propriety of grammar, as their general and popular ufe; and where words are clearly repugnant in two laws, the latter takes place of the former, upon the maxim, *leges pofteriores, priores contrarias abrogant**.

Whatever is given in evidence muft be

* Blackftone's Comment, v. 1, p. 59.

to

to the very fact or point in iſſue, either on one ſide or other; and no evidence ought to be allowed of to any other point, nor ſhould collateral matter of any ſort be admitted, unleſs conducive or introductory to the main point.

As to ſuch evidence as jurors may have in their own conſciences, by their private knowledge of facts, it was an ancient doctrine, that this had as much right to ſway their judgment, as the written or parol evidence which is delivered in court. And therefore it hath been often held, that though no proofs be produced on either ſide, yet they might bring in a verdict. For the oath of the jurors to find according to their evidence, was conſtrued to be, to do it according to the beſt of their own knowledge. But this doctrine was gradually exploded, and the practice which now univerſally prevails is, that if a juror knows any thing of the matter in iſſue, he may be ſworn

ſworn as a witneſs, and give his evidence publicly in court*.

3. Who may be witneſſes in criminal caſes, and who are exempted from being ſo.

All witneſſes who have the uſe of their reaſon, are to be received and examined, except ſuch as are *infamous*, or ſuch as are intereſted in the event of the cauſe. All others are *competent* witneſſes; though the jurors, from other circumſtances, will judge of their credibility. Intereſted perſons may be examined upon a *voir-dire*, if ſuſpected to be ſecretly concerned in the event; or their intereſt may be proved in court, which laſt is the only method of ſupporting an objection to ſuch as are *infamous*; for no man is to be examined to prove his own infamy†.

* Blackſtone's Com. v. 3, p. 374.
† Idem, p. 370.

But

But to be more particular, a husband and wife being as one and the same person in affection and interest *, can no more give evidence for one another in any case whatsoever, than for themselves, as they would contradict the maxim in law, that *Nemo in propria causa testis esse debit;* and regularly the one shall not be admitted to give evidence against the other, by reason of the implacable dissention which might be caused by it, and the great danger of perjury, from taking the oaths of persons under so great a bias, and the extreme hardship of the case; and it would contradict another maxim, *Nemo tenetur seipsum accusare;* yet some exceptions have been allowed † to this general rule, in cases of evident necessity. But the exception against kindred in general, though a good cause of challenge

* Coke upon Littleton, 66, 2. Rolle's Abridgment, 686, pl. 4.

† It was allowed in the case of Lord Audley, who held his wife, whilst his own servant, by his order ravished her.—State Trials, v. 1, f. 265, 269.

against

againſt a juror, is not ſo againſt a witneſs*; therefore the father may be a competent witneſs for or againſt his ſon, or *e'converſo*; or the maſter for his ſervant, or *e'converſo*; theſe or the like exceptions may be made to the credit or credibility of the witneſs, but are not exceptions againſt his competency; and it may be obſerved once for all, that the exceptions to a witneſs are of two kinds.

1. EXCEPTIONS may be made to the credit of the witneſs, which do not diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony. In ſuch a caſe the witneſs is to be allowed, but the credit of his teſtimony is left to the jurors, who are judges of the fact, and likewiſe of the probability or improbability, credibility or incredibility of the witneſs, and his teſtimony; and theſe exceptions are of ſo great variety and multiplicity, that they cannot be reduced under rules or inſtances.

* 2 Hale's H. P. C. 276.

2. EXCEPTIONS

2. EXCEPTIONS may be made to the competency of the witneſs, which exclude him from giving his teſtimony, and of theſe exceptions the court is to be the judge.

A CONVICTION of treaſon*, felony†, piracy‡, premunire§, perjury¶, or of forgery on the 5th of Elizabeth‖; alſo a judgment** in attaint for giving a falſe verdict, or in a conſpiracy at the ſuit of the king††, and alſo judgment‡‡ for any crime whatever, to ſtand in the pillory, or to be whipt§§ or branded, being

* Modern Rep. 16.
† Raymond's Rep. 148.
‡ Rolle's Abridgment, 686.
§ Coke upon Littleton, 66.
¶ Idem.
‖ Henry VI. 55, pl. 45.
** Coke upon Littleton, 66.
†† 33 Henry VI. 55, pl. 45.
‡‡ Salkeld's Rep. 689.
§§ Whipping is a puniſhment never adjudged in the common law courts, except for crimes that carry infamy

being in a court which had a jurisdiction*, are good causes of exception against a witness, while they continue in force, but no such † conviction or judgment can be made use of, unless the record be actually produced in court; and it is a general rule that a witness shall not be asked † any question,

infamy along with them, and therefore render the sufferer an incompetent witness; but the necessity of supporting military discipline often makes this punishment necessary to be inflicted on soldiers for misdemeanors and other small crimes, which cannot be termed infamous, and therefore should not render them incompetent witnesses, tho' they may perhaps appear to be incredible ones. For altho' judgment of the pillory infers infamy at common law, by the civil and the canon law it is no infamy, unless the cause for which the person was convicted was infamous, and it hath been adjudged, that 'tis not the standing in the pillory, disables a person to give evidence, but the standing there for some infamous crime, as forgery, &c. If for a libel, a man may be a witness, and so in other cases, when he is pardoned.—5 Mod. 16, 74.

* Synderfin's Rep. 51, pl. 16.

† State Trials, v. 1, f. 268.

the

the anſwering to which might oblige him to accuſe himſelf of a crime, and that his credit is to be impeached * only by general accounts of his character and reputation, and by proofs of particular crimes of which he never was convicted.

Outlawry † in a perſonal action is not a good exception againſt a witneſs. And a perſon convicted of felony, who is admitted to his clergy, and burnt in the hand ‡ is thereby re-enabled to be a witneſs.

The king's pardon § of treaſon or felony, after a conviction or attainder, reſtores the party to his credit; and Lord Chief Juſtice Holt ¶ is of opinion, that the king's pardon will remove a man's diſability to be a wit-

* Idem, v. 3, ſ. 256, 680.
† Coke upon Littleton, 6. b.
‡ Hawkins's P. C. b. 2, c. 39, ſ. 129.
§ Idem, b. 2, c. 37, ſ. 47, 48, 49.
¶ Salkeld's Reports, 514, 689.

neſs,

nefs, in all cafes whatfoever, wherein it is only the confequence of the conviction or judgment againft him, and not an exprefs part of the judgment, as it is in confpiracy, at the fuit of the king: and Sir Matthew Hale* thinks that one convicted of confpiracy, perjury, or forgery, may be a good witnefs, if pardoned.

In all cafes whatfoever, it is a good exception againft a witnefs, that he is to be either a gainer or a lofer by the event of the caufe, whether fuch advantage be direct and immediate, or confequential only.—And yet it appears from daily experience, that a perfon beaten †, and generally any other perfon to whofe damage ‡ a criminal information concludes, is a good evidence in a court of law, to prove fuch battery or other mifdemeanor, notwithftanding the

* Hale's Hift. Plac. Cor. 306.
† 2 Rolle's Abridg. 685, pl. 5.
‡ Synderfin's Rep. 237, pl. 5.

objection

objection that he may have an action: and in courts martial inferior officers are admitted as evidences against a superior, by the conviction of whom they are likely to gain promotion.

In some cases, although a consequential benefit to a witness doth not disable him from giving his testimony, yet it may abate the credit of it*.

It is no good exception against a witness that he has maintenance from the king, for every man may maintain his own witnesses; neither is it a good exception against a witness, that he hath received a reward for having made a discovery of the crime to be proved against the prisoner; nor that a witness hath the promise of a pardon, or other reward, on condition of giving his evidence, unless such reward be promised by way of contract, for giving such and such

* Hale's H. P. C. 280.

particular

particular evidence, or full evidence, or any way in the leaſt to bias him to go beyond the truth.

IT is allowed to be a good exception, that the witneſs believes neither the Old nor New Teſtament to be the word of God *, on one of which our laws require that the oath ſhould be adminiſtered; yet a Mahometan ſworn upon the 'koran has been admitted as an evidence †; for if a murder or other crime is committed in the preſence of a Turk only, who owns not the Chriſtian religion, it would be very hard that the criminal ſhould go unpuniſhed, becauſe ſuch an oath muſt not be taken; but the credit of ſuch teſtimony muſt be left to the jurors.

As to whether an accomplice, in the crime charged againſt the priſoner, may be

* Trials per pais, v. 2, f. 334 693. 2 Keble's Rep. 314, pl. 23.

† Hale's Hiſt. Pl. Cor. 279.

a witneſs

a witneſs for or againſt him, it has been long ſettled*, that it is no exception againſt a witneſs that he hath confeſſed himſelf guilty of the ſame crime, if he hath not been indicted† for it; for if no accomplices were to be admitted as witneſſes, it would generally be impoſſible to find evidence to convict the greateſt offenders.

And it hath been often overruled‡, that accomplices, who are indicted, are good witneſſes for the king, until they are convicted.

It hath alſo been adjudged§, that ſuch of the defendants, in an information, againſt whom no evidence is given, may be witneſſes for the others; and that where‖ A. B.

* State Trials, v. 1, f. 253.
† Idem, f. 723.
‡ Idem, v. 1, f. 966. 3 Keble's Rep. 136, pl. 70.
§ Synderfin's Rep. 237, pl. 4.
‖ Rolle's Abridgment, 685, pl. 3.

and

and C. are ſued in their ſeveral actions, on the ſtatute, for a ſuppoſed perjury in their evidence, concerning the ſame thing, they may be good witneſſes in ſuch action for another.

WANT of diſcretion* is a good exception againſt a witneſs; on which account alone an infant † may be excepted againſt, for in ſome caſes an infant of nine years of age has been allowed to give evidence; nay, in caſes of rapes, charged to be committed upon infants, thoſe of a much earlier age are allowed to be heard, without oath, to give the court information, though *that* alone is not ſufficient to convict the offender, without there be concurrent circumſtances to corroberate it, proved by other witneſſes ‡. But it is no objection againſt

* Coke upon Littleton, 6.
† Hale's P. C. 263.
‡ Idem, 634.

a witneſs that he is an alien, or villein, or bondſman *, &c.

Some are diſabled from being witneſſes, in regard of defect of intellectuals: a perſon of non-ſane memory cannot be a witneſs while he is under that inſanity; but if he has *lucida intervalla*, (lucid intervals) then during the time he hath underſtanding he may be a witneſs, but it is a difficulty ſcarcely to be cleared, what is the *minimum*, *quod ſic* diſables the party †.

No counſel, attorney, or other perſon, intruſted with the ſecrets of the cauſe by the party itſelf, ſhall be compelled, or perhaps allowed, to give evidence of ſuch converſation, or matters of privacy, as came to his knowledge, by virtue of ſuch truſt or confidence ‡; but not only an attorney ge-

* State Trials, v. 1, fol. 253.

† Hale's H. P. C. 278.

‡ Law of Niſi Prius, 267. Blackſtone's Comment. v. 3, p. 370.

neral,

neral, but any other counfel or attorney, and confequently the judge advocate at a general court martial, may be examined as a witnefs for either party, as to mere matters of fact*, and an attorney general or judge advocate, may be compelled to give evidence in favour of a criminal, though under profecution by himfelf, fhould he be called upon by fuch criminal. And as the judge advocate, befides being profecutor on the part of the crown, is alfo clerk or regifter of the court, he may alfo be called upon to produce the records or proceedings of a former court, and to prove upon oath the authenticity of fuch records or proceedings. And in all cafes where a judge advocate is called upon as a witnefs, the oath as fuch may be adminiftered to him by the prefident of the court; and after giving his teftimony, he is to reaffume the other functions of his office. Laftly, among thofe who

* Laws of Nifi Prius, 267. Blackftone's Com- v. 3, p. 370.

are allowed by law to be good witneſſes, it is neceſſary to mention the judges and jurors; but as inconveniences, or *doubts at leaſt*, may ariſe, upon members of a court martial, who act in the united capacity of judge and juror, being called upon as ſuch, I have already endeavoured* to point out how either or both may in moſt caſes be avoided.

4. In what manner the witneſſes are to give their evidence.

It muſt be premiſed, that the oath adminiſtered to a witneſs, is not only that what he depoſes ſhall be true, but that he ſhall alſo depoſe the *whole* truth, ſo that he is not to conceal any part of what he knows, whether interrogated particularly to that point or no†.

And witneſſes, in giving their teſtimony, muſt relate the very fact that the priſoner

* Vide Part I.

† Blackſtone's Com. v. 3, p. 372,

did,

did, or the very words that he made uſe of; for it is no evidence* in any criminal caſe, that the defendant did ſo and ſo, or ſaid ſo and ſo, or words to the like effect, becauſe the court muſt know the very act or words, to judge of their force and effect.

No witneſs is allowed to read any evidence he may have prepared in writing, but he may recur to notes to refreſh his memory.

BEFORE the reign of Queen Anne, it had been a conſtant immemorial † practice not to ſuffer witneſſes to be ſworn againſt the king, on trials of capital crimes, except in ſome caſes ſpecially provided for by ſtatute; though thoſe for the king were in all caſes ſworn: however, it is enacted by 1 Anne, 9, pl. 3. that, "after the 12th of February,

* Hobart's Reports, 294.

† State Trials, v. 1, f. 55, 148, v. 2, f. 296, 737. Hale's Pl. C. 264.

"1702, every perſon who ſhall be produ-
"ced, or appear as a witneſs on the behalf
"of the priſoner, before he or ſhe be ad-
"mitted to depoſe or give any manner of
"evidence, ſhall firſt take an oath to depoſe
"the truth, the whole truth, and nothing
"but the truth, in ſuch manner as the wit-
"neſſes for the queen are by law obliged to
"do; and if convicted of any wilful per-
"jury in ſuch evidence, ſhall ſuffer all the
"puniſhments, penalties, forfeitures, and
"diſabilities, which by any of the laws and
"ſtatutes of this realm are or may be in-
"flicted upon perſons convicted of wilful
"and corrupt perjury." And the act for puniſhing mutiny and deſertion, &c. directs that a general court martial ſhall adminiſter an oath to every witneſs*.

If a witneſs be produced and ſworn for the king, yet if that witneſs allege any matter in his evidence that is for the pri-

* Article 4.

ſoner's advantage, (as many times they do) that ſtands as a teſtimony upon oath for the priſoner, as well as for the king*.

A PEER, ſitting in judgment in the houſe of lords, gives not his verdict upon oath, like an ordinary juryman, but upon his honour†; but when he is examined as a witneſs, either in civil or criminal caſes, he muſt be ſworn; for the reſpect which the law ſhews to the honour of a peer, does not extend ſo far as to overturn a ſettled maxim that, *in judices creditur, niſi juratis*‡.

ALL witneſſes, either for the king or the priſoner, muſt be ſworn, and give their evidence in preſence of the whole court§, of

* Hale's Hiſt. Pl. Coronæ, 283.

† Salkeld's Reports, 512.

‡ Cro. Car. 64.

§ On a late general court martial, two material witneſſes being ſick, and unable to attend the court, in order to give their evidence, *ſix* of the members

 were

of the parties concerned, and all bye-ſtanders, each party having liberty to except to its competency, which exceptions are to be publicly ſtated, and openly and publicly allowed or diſallowed by the court. This open examination of witneſſes is much more conducive to the clearing up of truth*, than a private one; for a witneſs may frequently depoſe in private, that which he will be aſhamed to teſtify before a public and ſolemn tribunal; beſides, by this method of examination, all thoſe who are to decide upon the evidence have an opportunity of obſerving the quality, age, education, underſtanding,

were deputed to take it, at their own apartments, and report it to the court; for which irregularity, his majeſty thought proper to diſapprove of their proceedings: however, if material witneſſes, either for the king or priſoner, are unable to attend, thro' ſickneſs or other ſatisfactory cauſes, the *whole* court may adjourn to the ſick (or other) perſon's houſes, and there receive their evidence, the priſoner being preſent, and having an opportunity to croſs examine them.

* Hale's Hiſt. of the Common Law, 254.

derſtanding, behaviour, and inclinations of the witneſs, in which points all perſons appear alike, when their depoſitions are reduced to writing; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it*.

In the examination of the witneſſes, thoſe in ſupport of the charge are firſt to give their teſtimony, and then, the priſoner being put on his defence, is at liberty to produce what witneſſes he can, to confirm on oath what he himſelf affirms. The members of the court, the judge advocate or proſecutor, and the priſoner, have equally a right to queſtion and croſs queſtion the ſeveral witneſſes, whether produced on one ſide or the other; and either of the parties may inſiſt on the reſt of the witneſſes being out of court, while any one is under examination; however, it ſometimes becomes

* Blackſtone's Comment. v. 3, p. 373.

neceſſary to confront adverſe witneſſes, who diametrically and abſolutely contradict one another, in their relation of the ſame fact or facts.

The evidence on both ſides being heard, and the priſoner having made his defence, the proſecutor has a right, in caſe he finds it neceſſary, to make a reply. By a reply is to be underſtood, a right of obſerving upon the evidence in general, which cannot be done until it has been heard on both ſides, and alſo a right of controverting by evidence any *new* matter introduced by the priſoner in his defence; and as courts martial are inclined to grant every reaſonable indulgence to a priſoner, he is generally permitted, upon application, to give in his anſwer to the proſecutor's reply, which is termed a rejoinder; but this is rather a matter of ſpecial favour than of right; for he has already had his opportunity of ſtating the evidence on both ſides, and can have no new matter to controvert, becauſe the

the profecutor is by no means at liberty to produce any in his reply.

CHAPTER V.

Of giving a Verdict or Opinion, and paffing Sentence.

THE court having gone through the examination of the witneffes produced by the different parties, as well as the reply and rejoinder, (if there be any) are now to perform the moft ferious part of their bufinefs, which is, giving their opinion whether the prifoner be *guilty* or *not guilty* of the crime he ftands accufed of; and if found *guilty*, paffing fentence on him: previous to which, it is neceffary that all and every member fhould be perfectly informed of the matter in queftion; and in order to obtain this information, it fhould be fully debated amongft themfelves, and the judge advocate fhould make it his bufinefs to elucidate and explain whatever may be doubt-

ful or intricate. There are alſo ſome points in regard to guilt in general, which ought to be conſidered before they finally give their opinion.

In the firſt place, the guilt of offending againſt any known law whatever, neceſſarily ſuppoſing a wilful diſobedience, can never juſtly be imputed to thoſe who are either incapable of underſtanding it, or conforming themſelves to it; and therefore cannot apply to* thoſe who are under a natural diſability of diſtinguiſhing good from evil, ſuch as infants under the age of diſcretion, idiots, and lunatics, who are not chargeable for their own acts if committed under theſe incapacities; for it is obſerved by Sir Edward Coke, that the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat* †. Nay further, if any one‡ who has committed a capital crime, became *non compos*

* Hawkins's Pl. of the Crown, b. 1, c. 1.

† 3 Inſtitute, 6.

‡ Hale's Pl. C. 10, 43, 65. 3 Inſt. 4, 6.

compos before conviction, he ſhall not be arraigned; and if after conviction, he ſhall not be executed.

But he who is guilty of any crime whatever, through his voluntary drunkenneſs *, ſhall be puniſhed for it, as if he had been ſober; for drunkenneſs is rather an aggravation, than an excuſe for criminal behaviour.

Also he who incites a madman to commit a crime, is a principal offender †, and as much puniſhable as if he had done it himſelf.

A man that is urged to do what his judgment diſapproves, and what it is preſumed his will (if left to himſelf) would reject, may plead this in exculpation of himſelf.

* Coke upon Littleton, 247.

† Hale's Pleas of the Crown, 43, 44. Dalton's Juſtice, ch. 95.

IGNORANCE

Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, does not excuse any, who are of the age of discretion and *compos mentis*, from the penalty of the breach of it; because every person of the age of discretion and *compos mentis*, is bound to know the law, and presumed so to do*. It never therefore can be any excuse for a prisoner at a court martial to plead ignorance of the martial law, which is contained in so small a compass, and is repeated every two months at the head of every regiment, troop, and company †.

But in some cases *ignorantia facti*, (as the law terms it) or ignorance of the fact, doth excuse, because such ignorance many times makes the act itself morally involuntary; for if that act which is committed be simply casual and *per infortunium*, regularly that act, which, were it done *ex animi intentione*,

* Hale's Hist. Plac. Cor. 42.
† Articles of war, s. 20, a. 1.

were

were punifhable with death, is not by the laws of England to undergo that punifhment; for it is the will and intention that regularly is required, as well as the act and event, to make the offence capital. For inftance, it is known in war, fays Sir Matthew Hale *, that it is the greateft offence for a foldier to kill, or fo much as to affault his general; fuppofe then the inferior officer fets his watch or centinels, and the general, to try the vigilance or courage of his centinels, comes upon them in the night, in the pofture of an enemy, (as fome commanders have too rafhly done) if the centinel ftrikes or fhoots him, taking him to be an enemy, his ignorance of the perfon excufeth this offence.

The crimes which are cognizable before a court martial, may be divided into felonies and mifdemeanors, or more properly, into capital offences, and offences only criminal,

* Hale's Hift. Pl. Cor. 25.

and

and not in their nature capital; and if a prisoner, after having gone thro' the evidence, does not appear to be guilty of a crime of so capital a nature as was set forth in the charge, yet the court may find him guilty in a less degree, if I may so term it, but not a quite different sort of crime or misdemeanor.—As for instance, a soldier tried for desertion may be found only guilty of absenting himself without leave. The act and deed is the same, but the intentions that accompany it, which must be judged of from circumstances, are what constitute the crime, and not the length of time that he is absent, or the distance to which he escapes. Many a man flies from his colours but for a short time, and yet gives evident proofs of his being a deserter in every sense of the word, whilst another, poor wretch! may absent himself much longer, through drunkenness, fear of punishment for some other offence committed, &c. and yet manifest no intention of totally abandoning the service. In such case, I say, a court martial may acquit him

him of desertion, but find him guilty of absenting himself without leave, and punish him accordingly; but they cannot declare him guilty of mutiny, or any other distinct crime or offence, (though there may appear strong suspicion of his being so) unless it be likewise in the charge given against him before the trial commences*. But in this case the court are expressly to insert in their verdict or opinion, that they acquit him of the crime of desertion, but find him guilty of that of absenting himself without leave; for in a court of law it hath been adjudged†, that if a jury on an indictment, or appeal of murder, find the defendant guilty of manslaughter, without saying expressly as to the

* If in the course of the trial for one crime there appears strong suspicion of another, which is not given in charge to the court, though the prisoner may be acquitted of the one he is then tried for, the court may order him into confinement, and he be brought to a new trial for the crime he was suspected of.

†Hawkins's Pl. of the Crown, b. 2, c. 47, s. 5.—1 Anderson's Rep. 103, 104.

murder

murder, it is inſufficient and void, as being only a verdict for part.

It is uſual at courts martial, as well as in courts of law, to allow offenders in criminal caſes to bring in perſons of credit, to give their teſtimony of the accuſed perſon's good behaviour and integrity of life. This cuſtom is very ancient, having been in uſe among the Romans, by whom it was called *laudatio*, and the perſons *laudatores*, of which the ſmalleſt number called, uſed to be ten*. The teſtimony of theſe witneſſes may be of the greateſt ſervice in ſome caſes; as in that of a man tried for murder, if they prove that he is not of a quarrelſome, revengeful temper; for tho' it may be clear to the jury that he put the man to death, yet this may induce them to acquit him of murder, and find him guilty of manſlaughter only; an alleviation that the law allows for the frailty of mankind, when it does not appear that the fact was

* Kennet's Ant. of Rome, p. 2, b. 3, c. 18, p. 40.

committed

committed with malice aforethought, but in sudden gust of passion. Or if a soldier be tried by a court martial, for mutiny, desertion, &c. and there is only presumptive proof against him, creditable witnesses to his former character and behaviour will certainly influence the court in some measure in his favour; but where there appears positive proof of such mutiny, desertion, &c. the court cannot avoid finding him guilty, and passing sentence accordingly, let his former character be ever so good, though it may perhaps induce them to recommend him for mercy, the granting of which is solely vested in the king, or the general who approves of the proceedings; and therefore out of the power of the court martial.

When the members are ready to give their opinions, the judge advocate is to put to every one, separately, this question: From the evidence given for and against the prisoner, and from what he had to offer

fer in his defence, are you of opinion that he is guilty or not guilty of the crime or crimes laid to his charge? If the majority find him not guilty, he is accordingly acquitted: but if it appears, upon the casting up of the votes, that the majority declare him guilty, those who have found him so, (for it cannot be supposed that those who have found him not guilty would assign him a punishment) are to pass sentence or judgment on him, for laws would be of little effect, unless they could impose pains and penalties upon the offenders against them.

THE pains and penalties are various, according to the nature of the offences, or the detriment that comes thereby to society; some are corporal, but not capital, such as imprisonment, flagellation, &c. others are capital, *ultimum supplicium*, or death.

THE laws of man are supposed to be founded on the laws of God and nature; but to observe strictly that of retaliation, or

or the *lex talionis*, which is, *eye for eye, wound for wound, ſtripe for ſtripe, life for life*, &c. would not ſuit the preſent degenerate age; the inflicting of puniſhments being, in moſt caſes, more for example, and to prevent evils, than to puniſh; for when offences grow enormous, ſevere puniſhments, even death itſelf, is neceſſary to be annexed to laws in many caſes, by the prudence of lawgivers, though poſſibly beyond the ſingle demerit of the offence itſelf, ſimply conſidered.

THE articles of war, in a few caſes, point out the expreſs ſentence to be paſſed on criminals, without any alternative; in ſome an optional power is given, of puniſhing with death or otherwiſe; and in others, offenders are puniſhed at the diſcretion of a court martial, omitting the word *death*, evidently meaning thereby to exclude the power of puniſhing capitally.

THE

THE capital punishments inflicted by martial law, are common to both officers and private soldiers, and are generally executed in the same manner, but a wide distinction should be made in the mode of inflicting punishments of an inferior kind on officers and soldiers. What may be regarded as a slight penalty inflicted on the one, would be considered as of great magnitude to the other, and so *vice versa*; for habit and education make wide distinctions in the minds and manners of mankind. To dismiss an officer from his majesty's service would be esteemed a heavy punishment, whereas a private soldier would look upon it, in many cases, as a favour conferred on him; and on the other hand, a corporal punishment, which but seldom operates on the feelings of a private soldier, must touch a commissioned officer so sensibly, who has the sentiments of a gentleman, as to render his future life a burthen to him.

FOR

FOR crimes that officers and ſoldiers may be guilty of, which are not of ſo capi-al a nature as to deſerve death, *caſhiering* s preſcribed for the former, and corporal uniſhment for the latter; and for miſde-neanors of a ſtill more inferior nature, cuſtom has introduced ſuſpenſion for a ime; public and private reprimands, &c. or officers, and other ſlight puniſhments or ſoldiers.

ANOTHER puniſhment has latterly been authoriſed by act of parliament, which is, ſending ſoldiers, who may be convicted of crimes not ſufficiently capital to be puniſh-ed with death, to ſerve in regiments a-broad, either for life or a term of years; and in caſe they return, to ſuffer death. This is in ſome meaſure like tranſportation by the courts of law, (which is now alter-ed to hard labour on the river Thames) though not ſo exemplary and ſhameful a puniſhment; for they in fact only ſuffer what many others of his majeſty's troops are

are liable to, who have never been convicted of any crime.

SUCH are the different punishments inflicted by martial law, and by which every member of a court martial is to be guided in passing sentence.

IF a prisoner is found guilty of a crime, in the punishment of which there is no alternative, any further questions become unnecessary; if convicted of an offence punishable at the discretion of a court martial, the next obvious and only requisite question more is, what punishment shall be inflicted on the prisoner, whom you have found guilty? But in cases where an optional power is vested in the court to punish with death or otherwise, the question to follow that of *guilty* or *not guilty* (upon the court, or the majority of it, declaring for the former) is, whether or not the prisoner shall suffer death? If two-thirds of the court do not concur in the affirmative, the votes of the

the affirmants are confidered as void, being incapable of taking effect, as no fentence of death can be given againft any offender, by a general court martial, unlefs nine out of thirteen, or two-thirds of thofe prefent, concur therein. A leffer number then, being incompetent to give judgment of death, another queftion becomes neceffary to be propofed to every member indifcriminately, viz. what punifhment (other than death) fhall the prifoner undergo? And each member gives his voice *(de novo)* in this queftion, wherein a *majority* of the members is competent to determine.

This is the ufage which has long obtained; fhould it however be contefted that a member is not compellable to give his voice for any other punifhment, having once given his vote for death, in that cafe (for the ftrict right can never be brought to a decifion in the perfon of any individual, as the very ftating of the matter would tend to difclofe the particular vote) it muft

K of

of neceffity be, that the fentence purfue the major part of thofe who did not give a voice for death, though they fhould happen to be but an inconfiderable part of the whole court taken collectively.

It may often happen that the court is unanimous, both in their opinion concerning the guilt of the prifoner, and the judgment paffed on him, but the judge advocate, in regiftering fuch opinion and fentence, is by no means authorifed to infert the word *unanimous*; on the contrary, he is abfolutely fworn not to divulge the vote of any particular member, whereas by the infertion thereof he would difclofe that of every one; but where there is a diverfity of opinions, it is neceffary that he retain private *memoranda* of thofe of every individual, that he may be prepared to give evidence thereof, as a witnefs, to a court of juftice, in a due courfe of law, as his oath expreffes.

Martial law is laid down in so plain and simple a manner, that every military man is, or ought to be acquainted with what are thereby deemed crimes, and may judge in a great measure what is to be expected by one who is guilty of any of them; but at the same time he has the satisfaction to know that he must be previously convicted by a court, where justice and equity always preside, and where the innocent can run no risk of punishment; but the guilty are in general sure to meet with their deserts.

AN

E S S A Y

CONCERNING

CRIMES & PUNISHMENTS,

BY

MAJOR STEPHEN PAYNE ADYE.

Misera est servitus, ubi jus est vagum aut incognitum.

TO

JAMES PATTISON, Esq.

MAJOR GENERAL OF HIS MAJESTY'S FORCES,

AND

COLONEL COMMANDANT OF A BATTALION OF THE ROYAL REGIMENT OF ARTILLERY.

&c. &c. &c.

SIR,

TO inculcate the advantage of preventing crimes, and its superior efficacy to the reformation produced by severity and rigour, are principal objects of the following Treatise. It is also my anxious wish to recommend the faithful distribution of rewards, as a high inducement to virtuous conduct. Such being the views with which I composed these sheets, I could not possibly find a patron to whom I could address them with a happier propriety.

For

For it is univerſally known that you have diſtinguiſhed yourſelf in your public capacity, by the moſt fortunate intermixture of juſtice and humanity. But while my ſubject points to you ſo forcibly, I feel a flattering pride in the opportunity afforded me of appealing to the entire friendſhip which ſubſiſts between us. Be ſo kind, then, as to accept the tribute which ſo fully belongs to you.

I have the honour to be,

With the moſt perfect reſpect,

SIR,

Your moſt faithful and

Moſt humble ſervant,

STEPHEN PAYNE ADYE.

AN

ESSAY

ON

MILITARY PUNISHMENTS AND REWARDS.

IT will be neceſſary to divide this ſubject into two parts, and to ſpeak of each ſeparately. Firſt, then, of penalties and puniſhments.

PUNISHMENT, as defined by Grotius, and ſubſcribed to by Selden and Puffendorf, is an evil of ſuffering, on account of ſome bad action, *malum paſſionis, ob malum actionis;* but the author of a modern work, entitled, *Conſiderations on Criminal Law,* defines puniſhment to be an evil

K 5 which

which a delinquent ſuffers unwillingly, by the order of ſome lawful ſuperior, on account of ſome act, wilfully done, which the law prohibits; or of ſomething omitted, which the law enjoins.

The making of laws penal may claim the ſame origin as that of laws themſelves; for when God gave his firſt commandment to Adam, which was, that he ſhould not eat of the tree of knowledge of good and evil, he alſo ordained, that, in the day he eat thereof, he ſhould ſurely die; and we find, ever ſince, that although different nations have adopted different modes of puniſhment, yet it ſeems to have been the general ſyſtem, that laws would have been of very little effect, if they had not alſo given a ſanction for impoſing penalties.

The inflicting of puniſhments, as I have already obſerved in the Treatiſe on Courts Martial, being more for example, and to prevent evils, than to puniſh, when offen-

ces

ces grow enormous, severe punishments, nay even death itself, is necessary to be annexed in many cases, although possibly beyond the single demerit of the offence, simply considered. But yet, I cannot but discommend the making capital punishments too familiar; for when a man, after committing perhaps a trifling crime, finds that the penalty attending it is the same as if he had been guilty of a more enormous one, it is a strong inducement to a vicious mind to dive deeper into guilt. When great punishments are only inflicted for great crimes, it will be the more easy to reform abuses, because all the world concurring in the necessity of them, will cheerfully promote their effect; whereas, if capital penalties are incurred upon every trifling occasion, humanity will revolt at the idea, and induce officers often to hide and overlook the lesser crimes soldiers may be guilty of, rather than bring them to conviction. But when there is a necessity of making a public example, although we may

betray a concern at being obliged to exercise, with rigour, the rules of military discipline, we should look upon cruelty and severity as terms misapplied in an exemplary punishment.

However, so averse am I to punishment in general, that every method, I think, ought to be previously taken, to deter soldiers from committing crimes, rather than trust to a reformation, by punishing them. If a man, who has any sense of honour, is once made a public example of, despair will frequently drive him to commit crimes before unthought of; or, at least, he will give himself up to shame and remorse, and thereby a subject is, I may say, irretrievably lost, who, by more lenient treatment, might have been of eminent service to his country. The most excellent natures will sometimes err, but may be again restored to their former state, by a sense of shame and honour alone; but tempers

pers innately vicious, can hardly be exalted into good habits, even by puniſhment.

I CANNOT reſiſt the temptation of offering to the conſideration of my readers, the ſentiments of ſome authors of high repute, who have coincided with, or rather, (to do juſtice to their worth) have implanted in me the doctrine of prevention of crimes, in preference to truſting to reformation by ſubſequent puniſhment.

THE method of preventing crimes, ſays Lord Coke, who writes on this ſubject in rather general, though not leſs pointed terms, is, 1ſt, By training up youth in the principles of religion, and habits of induſtry; 2dly, In the execution of good laws; and 3dly, In granting pardons but rarely, and upon good reaſons. Every wiſe legiſlature will, in the enacting of criminal laws, have it in contemplation, rather to prevent than puniſh crimes; and whilſt they chaſtiſe the delinquent,

delinquent, will endeavour to reform the man.

From the preſent mode of forming our ſoldiery, we are in general obliged to take recruits without previouſly conſulting whether they have been trained up in their youth, in the principles of religion, and habits of induſtry; but a prevention of crimes is certainly in our power, which to a humane heart will ever be a more pleaſing taſk, than the execution of the very beſt of laws; and this prevention will tend to render the neceſſity of pardons more and more rare.

What then can be more conducive to the deterring of men from committing crimes, than making them properly acquainted with the laws* by which they are to be governed,

* Juſtinian has reduced the whole doctrine of laws to theſe three general precepts. "Juris præcepta ſunt

ed, and the fatal consequences attending a breach of them.

I do not know, says the humane and benevolent Marquis of Beccaria, in his most excellent essay on crimes and punishments, of any exception to this general axiom, that every member of society should know when he is criminal, and when innocent. The uncertainty of crimes hath sacrificed more victims to secret tyranny, than have ever suffered by public and solemn cruelty. Would you prevent crimes, let the laws be clear and simple; let them be intended rather to favour every individual, than any particular classes of men; let the laws be feared, and the laws only.

It is an honour, and almost a singular one to the English laws, that they furnish

"sunt honeste vivere, alterum non lædere, suum "cuique tribuere." And Grotius defines equity to be "the correction of that, wherein the law, by "reason of its universality, is deficient."

means

means of preventing the commiſſion of crimes. Of all the parts of a law, the moſt effectual, pleads Blackſtone, is the indicatory; for it is but labour loſt to ſay, "do this, or avoid that," unleſs we alſo declare "this ſhall be the conſequence of your non-compliance."

Another modern writer thus joins in ſentiment. The prevention of crimes ſhould be the great object of the lawgiver, whoſe duty it is to have a ſevere eye upon the offence, but a merciful inclination towards the offender. It is from an abuſe of language that we apply the word "puniſhment" to human inſtitutions. Vengeance belongeth not to man. Criminals, ſays Plato, (*de legibus*) are not puniſhed becauſe they have offended, for what is done cannot be undone, but that for the future the criminals themſelves, and ſuch as ſee their puniſhment, may take warning, and learn to ſhun the allurements of vice. *Meti Suffeti, inquit Tullus, ſe ipſe dicere poſſes fœdera ac fidem ſervare, vivo tibi*

tibi ea diſciplina a me adhibita eſſet: nunc quoniam tuum inſanabile ingenium eſt, Tu tuo ſupplicio doce humanum genus ea ſancta credere, quæ a te violata ſunt. It is the end then of penal laws, to deter, not to puniſh. To effect this, other means may be ſubjoined to that of making men previouſly acquainted with the laws by which they are to be governed; and none can throw more additional weight into the ſcale, than binding them by the moſt ſolemn and ſacred ties to a due obſervance thereof.

In every nation, and in every age, an oath has been of the greateſt conſequence and conſideration in promiſes, agreements, and contracts.

"An oath with ſacred awe, doth rouſe the
"ſoul,
"And thus reſtrains her, from the double
"miſchief
"Of angring friends, and of offending
"Heav'n." SOPHOCLES.

THE

The Romans, as soon as they had completed their levies, obliged every soldier to take a military oath, by which he engaged to hazard his life for the commonwealth, to obey his general, and not to fly from his colours, or quit the army without leave. The whole legion, passing one by one, swore to the same, each saying as he went by, *Idem in me.* This, and some other oaths, were so essential to the military state, that Juvenal, in Satyr XIV. 35, uses the word *sacramenta* for *milites* or *militiæ*. Nor was this a mere ceremony, but a solemn act of religion, and esteemed so consequential, that no man was deemed a soldier, nor allowed to strike or kill an enemy, if he had not taken the customary oath; and this oath was held so sacred among the troops, and became so inviolably a bond of fidelity and subjection, that the soldiers, however displeased and enraged, did not dare to quit their general so long as this tie was supposed to remain in force; nay so very tender and scrupulous were they, that even in

in their greateſt impatience to be diſcharged, they would never admit of any interpretation that carried in it the leaſt ſtrain or appearance of deceit.

Nay, ſuch was the influence of an oath amongſt them, that nothing bound them ſtronger to the laws.

They often did more for the obſervance of an oath, than they would ever have performed for the thirſt of glory, or for the care of their country, as appears in many inſtances recorded in hiſtory. Hence it was an uſual ſtratagem in a dubious engagement, for the commanders to ſnatch the enſigns out of the bearers' hands, and throw them among the troops of the enemy, knowing that their men, ſo far from abandoning them, would venture the greateſt danger to recover them.

Among the Greeks we likewiſe find, that the military oath was accounted inſeparable

rable from the ſtate of a ſoldier. This ſolemn method of enforcing obedience and fidelity, prevented the two greateſt crimes a ſoldier can be guilty of, viz. mutiny, and deſertion; crimes too frequent in our modern armies, and which are of the utmoſt conſequence, when once they get any footing. It may ſeem ſtrange that thoſe who call themſelves Chriſtians, ſhould be more apt to commit perjury and breach of faith, than Heathens; yet I cannot account for it in a more favourable manner than by attributing it in a great meaſure, to our inattention to what we ſeem to think a mere matter of form, though found of ſo eſſential ſervice among the ancients.

The King of Pruſſia, (whom we may juſtly term a pattern for modern heroes) highly ſenſible of how much advantage it is that a ſoldier be ſtrictly bound to be firm to his truſt; and at the ſame time conſcious of the injuſtice of puniſhing a man for a crime which he does not know to be ſo, expreſsly

expreſsly directs in his military regulations, that when the new colours or ſtandards of a regiment are ſworn to, the ſollicitor ſhall firſt make an harangue, and read the articles of war, and the chaplain then ſay a prayer, imploring God out of his grace and goodneſs, to ſave every ſoldier from being perjured, and ſo to govern him, that on all occaſions, in battles, ſieges, and engagements of any kind, he may continue firm to his colours, and maintain them againſt an enemy to the laſt drop of his blood. And he further directs, that when a recruit ſwears to the colours or ſtandards, the violation of an oath, and the divine vengeance which will infallibly attend it, muſt be explained to him, and he himſelf acknowledge that he underſtands every particular well, and voluntarily offers to be conformable thereto, before he takes the oath.

Although we have no *ordonnance* or regulations with reſpect to troops ſwearing to their colours, ſome ceremonies, ſimilar to

to thoſe practiſed in the Pruſſian ſervice, have been introduced and adopted in ours, on the colours being firſt preſented to a regiment. But on recruits being enliſted ſubſequent thereto, they are hurried away to a juſtice of the peace, before whom they take an oath of fidelity; but no clergyman ever attends, in order to point out to them how much they offend their God, as well as their king, by a breach of that oath. And the generality of them are too prone to think, that the ſafety of their bodies ſhould be their only care, after forfeiting their engagements, without ſuſpecting their ſouls to be any ways concerned.

A STRONG proof of what I aſſert preſented itſelf at the execution of a grenadier, who was ſhot at Plymouth during the late war, for deſertion, and who ſuffered with great fortitude, being conſcious, *he ſaid*, of having done nothing to offend his Saviour.

THAT

THAT a prevention of crimes, as far as the frailties of human nature will admit of it, ſhould be the primary object of every wiſe legiſlature, whether in a civil or miltary line, is too obvious to require any further argument or illuſtration; but whatever may have been the virtue of the ancients, we ſee too frequent inſtances in the modern world, to convince us, that many men are not to be deterred from vice, altho' ever ſo well acquainted with the atrocioufneſs of it; it muſt therefore be allowed that there is an abſolute neceſſity of ſometimes inflicting puniſhments for the good of ſociety. Heirocles calls puniſhment the medicine of wickedneſs; that puniſhment is eſſential, in order to keep up good order and military diſcipline in an army, muſt be evident to every military man; and that military diſcipline is more conducive to victory than numbers, is as apparent.

NEXT to forming of troops, ſays M. Saxe, military diſcipline is the firſt object that preſents

presents itself to our notice; for it is the soul of all armies. And unless it be established amongst them with prudence and unshaken resolution, they are no better than so many contemptible heaps of rabble, which are more dangerous to the very state that maintains them, than even its declared enemies.

The Romans, as professor Duncan observes, from small beginnings, rose by degrees to be sovereigns of the world. If we enquire into the causes of this, we shall find that nothing so much contributed to it, as their excellence of military discipline. The many difficulties the king of Prussia extricated himself from, during the last continental war, when surrounded by armies so far superior to him in numbers, are recent proofs how much military discipline is conducive to victory. And I think I may, without vanity, add, that the many successes of the British arms over those of

France

France and Spain, were not attained by ſuperiority of numbers.

Since then military diſcipline is ſo eſſential to an army, and puniſhments ſo neceſſary to military diſcipline, it will be proper now to ſpeak as well of the uſes of puniſhment in general, as of the ſeveral modes of inflicting it.

The ſeveral uſes of puniſhment may be reduced to three. The firſt, which is common to all puniſhments, except death, is to reform thoſe that are puniſhed.

The ſecond, which is peculiar to capital puniſhments, is to put the criminals out of a condition of cauſing new troubles to ſociety; and the third and laſt, which is common to all ſorts of puniſhments, is the uſe of example, for reſtraining, by the ſight and fear of puniſhment, thoſe who abſtain from crimes only out of fear; and it is this example that diminiſhes the number of crimes,

which would multiply to a ſtrange degree, if they were ſuffered to go unpuniſhed.

If reformation in the perſon of the puniſhed is the object, the puniſhment ſhould be ſuch as may give temporary pain and anxiety, whether corporal or otherwiſe, to the ſufferer; but which ſhould carry no laſting infamy with it, other than the reflection of having been puniſhed, and ſhould vaniſh in time, not only from the recollection of the world in general, but that of the culprit himſelf, provided repentance is an attendant thereto.

If the object be, to put criminals out of the power of cauſing new troubles to ſociety, nothing more can be ſaid, than, at the execution of a ſinful mortal, it ſhould be endeavoured to convince the multitude that it was neceſſity, not inclination, which led the legiſlature to bring him to that untimely end, and to warn them againſt following the ſame evil ways. And laſtly, with reſpect to the uſe

of

of example, nothing in general can be more prevalent; yet we find that this is often insufficient: however, it is the best apology that can be made for legislatures who inflict what otherwise might be deemed cruel and inhuman punishments.

The modes of punishment have varied according to the ideas, whether political or religious, of different nations and sects. To enter into a detail of those hitherto practised, was it even possible to recount them, would be foreign to my present subject; it cannot, however, be erring from it, to examine those which may be termed the military punishments of such whose arms have shone with the greatest splendour, in order, by comparing them with our own, we may be the better able to judge wherein we can amend. For nations, no more than individuals, are infallible, and therefore ought not to be so tenacious of their own customs, as not to pay due attention to those of others, even of an enemy. Death may be

esteemed by all, the *ultimum supplitium*, or most capital punishment; but this may be accounted more or less severe, according to the manner of executing it.

Torture, I declare my aversion to; but as punishments are meant more for example, than to give pain to the offending culprit, death may be inflicted in a more or less disgraceful manner, according to the nature of the crime. As for instance, in the French service, those who desert into an enemy's country are hanged, but those who desert to engage in another regiment, or without quitting France, are shot.

The military punishments used by the Romans were such as reached the offender's body, credit, or goods.

The principal corporal punishment was something like running the gantelope, in practice amongst many modern nations, although generally attended with more fatal consequences,

consequences, and therefore may be accounted for the most part *capital;* for as soon as the criminal had liberty to run, the soldiers were allowed to kill him if they could; so that being persecuted with swords, darts, stones, and all manner of weapons on every hand, he was presently dispatched.—This penalty was incurred by stealing any thing out of the camp, by giving false evidence, by abandoning his post in battle, by pretending falsely to have done some great exploit from hope of reward, or by fighting without the general's order*; by losing their arms, or aggravating a misdemeanor, by repeating it three times.

If a great number had offended, as running from their colours, mutinying, or other general crimes, the common method of proceeding to justice was by decimation; that is, every tenth man being to die, was exe-

* "In bello, qui rem a duce prohibitam, fecit, "aut mandata non servavit, capiti punitur, etiamsi "res bene gesserit."

cuted; for which they drew lots. By this means, though all did not ſuffer, yet all were terrified into obedience. In ſome authors we meet with *viceſimatio* and *centeſimatio*, which terms ſufficiently explain themſelves.

The puniſhments that reached no farther than a ſoldier's credit, by expoſing him to public ſhame, were degrading him from a higher rank to a lower; giving him a ſet quantity of barley inſtead of wheat; ungirding and taking away his belt; making him ſtand all ſupper time, whilſt the reſt ſat down, and other marks of diſgrace. But ſhame, it muſt be obſerved, loſes its effect, when puniſhment is inflicted without a juſt and careful diſtinction, or when by wantonneſs or oppreſſion it is made too familiar. However, ſhame will alone, in ſome caſes, work reformation, ſooner than ſeverer puniſhments, which even cauſe bodily pain.

ARTAXERXES enacted, that the nobility of Persia who debased themselves, instead of being lashed, which had been the practice, should be stripped, and the whipping to be given to their vestments; and that instead of having the hair plucked off, they should only be deprived of their high crowned *tiaræ*. And the Lacedemonians punished a coward, by cloathing him in woman's apparel, and making him stand every third day in the market or other public place, which was looked upon by men of spirit as worse than death. Aulus Gellius has recorded a very singular punishment among the Romans, by letting the delinquent blood. His judgment concerning the origin of this custom is to this purpose: He fancies that in former times this used to be prescribed to the drowsy and sluggish soldiers, rather as a medicinal remedy than a punishment; and that in after ages it might have been applied in most other cases, upon this consideration, that all those who did not observe the rules of discipline were to be

looked upon as ſtupid or mad; and for perſons in that condition, blood-letting is commonly ſucceſsful.

But becauſe this reaſon is hardly ſatisfactory, *Muretus* has given us another, believing the deſign of this cuſtom to have been, that thoſe mean ſpirited wretches might loſe that blood with ſhame and diſgrace, which they dared not to ſpend nobly and honourably in the ſervice of their country.

As for the puniſhment relating to their goods and money, the tribunes might for ſeveral faults impoſe a fine on the delinquents, and oblige them to give a pledge, in caſe they could not pay; ſometimes too they ſtopped the ſtipend, whence they were called by way of reproach *æri diruti*.

Amongst the Egyptians, neglect of duty, flying in battle, or cowardice, was puniſhed only by marks of infamy, it being thought more adviſable to keep them in order,

der, by the motive of honour, than fear of punishment; and mutiny and desertion were punished by degradation and disgrace, which could never be wiped away but by brave actions; but those who betrayed secret designs had their tongues cut out.

It is remarkable that by the laws of Lycurgus, amongst the Spartans, stealing was lawful, and encouraged as a military exercise, but punishable if found out. Plutarch relates a story of a boy, who having stole a fox, and hid it under his coat, chose rather to let it tear away his very bowels, than discover the theft.

By the laws of Athens, those who maintained their post with courage were advanced, but others were degraded. All who refused to go into the army, cowards, and runaways, were expelled the forum, were not crowned, and could not go to the public temples. He who cast away his arms was declared infamous.

The ancient Germans admitted of none but pecuniary puniſhments, being of opinion that their blood ought not to be ſpilt but with ſword in hand. On the contrary, theſe puniſhments are rejected by the Japaneſe, under pretence that the rich might elude them.

According to Tacitus, the Germans knew only two capital crimes; they hanged traitors, and drowned cowards. Amongſt other modern puniſhments, the gantelope has been adopted, not only by the Pruſſians, but moſt other German powers; it is likewiſe in uſe amongſt the French, although ſeldom inflicted, except for capital crimes; for it being reputed ignominious, becauſe inflicted on common rogues and vagabonds, by the hands of the hangman, the ſufferer is always obliged to paſs under the colours, after he has received his puniſhment, in order to take off this idea of ignominy which is attached to it; and even this ceremony is often found inſufficient to wipe

wipe off the ſtain ſo effectually as to prevent deſertion. Upon deſertion growing to great height in France, it was judged proper to puniſh ſuch delinquents with death, and yet their number did not decreaſe. The reaſon, argues Monteſquieu, is very natural: A ſoldier, accuſtomed to venture his life, deſpiſes, or effects to diſpiſe, the danger of loſing it.

I AM not ſo prejudiced in favour of the cuſtoms of my own country, as to condemn all others as faulty; neither do I mean to adopt one merely becauſe it is Roman, and reject another, becauſe flowing from a nation of leſs repute. What I ſhall now attempt, is impartially to point out the errors or excellencies of thoſe I have juſt recited, together with thoſe of our own, and then draw ſome general obſervations on puniſhments in general. Death, as was before obſerved, may be executed in a more exemplary manner for one crime than another, although not attended with more torture to

the criminal, and therefore I am naturally led to approve of the diſtinction made in the French ſervice between hanging and ſhooting; for although they both terminate in the ſame manner, the ſuffering as a common felon may be juſtly eſteemed a more capital puniſhment, than in a method peculiar to a ſoldier.

My averſion to a cruel manner of inflicting death, muſt conſequently induce me to condemn the Roman method of executing it, by allowing the criminal to be ſhot at by the ſoldiers with darts, &c. but their puniſhments which reached their credit, by expoſing them to public ſhame, are highly commendable; for nothing is more likely to work a reformation in a ſoldier, who ought to have ſome ſenſe of honour, or elſe he is unworthy of the name, than inflicting a puniſhment which may be wiped off by his future good behaviour.

FINES

Fines being ſometimes impoſed, may alſo be attended with good conſequences, for thoſe who are inclined to avarice and love of money will think this a very ſevere penalty; but as to the method of letting blood, practiſed by the Romans, whatever might be *their* motives for it, it appears too romantic to carry any weight with it among the modern ſoldiery.

Desertion has ever been regarded, by both ancient and modern nations, as a military offence of the greateſt magnitude.—Charondas, the famous lawgiver of the Thurians, inſtituted a whimſical puniſhment for this crime, not unlike that of the Lacedemonians for cowardice: he enacted, that deſerters ſhould be compelled to ſit three days in the market place, in female dreſſes; and this law, ſays Diodorus Siculus, excelled the proviſions of other lawgivers on the ſame object, both in humanity and wiſdom.

It was anciently the custom in France to cut off the ears, or slit the nose of a deserter; and Montesquieu thinks that it was absurd to relinquish this practice for the punishment of death. For soldiers, argues he, are habituated to the contempt of death and the dread of shame, so that the terrors of the penalty were diminished, while they were intended to be increased.

The Jews used to give wine mingled with myrrh to a malefactor, at the time of his execution, in order, as it is said, to cause a stupor, and deaden the sensibility of the pain. And amongst the Athenians, a murderer, after trial and conviction, was left to the relations of the deceased, to be put to death if they thought proper, but they were not permitted to use any degree of torture, or to extort money.

To conclude then the particular subject of military punishments, I shall go into a short recapitulation of what has already been

been ſaid, and make a few obſervations on puniſhment in general. I have gone thro' a detail of the military puniſhments of both ancient and modern nations; ſome of them appear too ſevere, others too lenient.

As puniſhments become more mild, clemency and pardon are leſs neceſſary. That puniſhments are eſſential to the good of ſociety in general, and particularly to the keeping up good order and diſcipline in an army, is too apparent to call for argument; but it muſt, I ſhould think, appear, that the work of eradicating crimes is not to be effected by making puniſhments familiar, but formidable; to be both is not poſſible, for familiarity with puniſhment, as with other things, will breed contempt.

In aſſigning puniſhments, not only the nature of the crime or offence, but the motive which induced the perſon to commit, and the circumſtances attending the committing of it, are to be conſidered. For it may be committed

mitted, either out of premeditated defign, in the heat of paffion, or through imprudence, which may each be confidered in its proper degree; thus, in a tranfport of paffion, it is more culpable than when proceeding from imprudence; and through premeditated defign, more heinous than in a tranfport of paffion. The violence of paffion or temptation may fometimes alleviate a crime; as theft, in cafe of hunger, is far more worthy of compaffion than when committed through avarice; or to fupply one in luxurious exceffes. To kill a man upon a fudden and violent refentment, is lefs penal than upon cool deliberate malice. The age, education, and character of the offender, the repetition (or otherwife) of the offence, the time, the place, the company wherein it was committed; all thefe, and a thoufand other incidents, may aggravate or extenuate the crime. Sir Michael Forfter, in the preface to his Reports, obferves, that no rank or elevation in life, no uprightnefs of heart, no prudence or circumfpection of conduct, fhould tempt a man

man to conclude, that he may not at ſome time be deeply intereſted in theſe reſearches.

The infirmities of the beſt amongſt us, the vices and ungovernable paſſions of others, the inſtability of all human affairs, and the numberleſs unforſeen events which the compaſs of a day may bring forth, will teach us (upon a moment's reflection) that to know with preciſion what the laws have forbidden, and the deplorable conſequences to which a wilful diſobedience may expoſe us, is a matter of univerſal concern.

Whatever ſpecies of puniſhment is pointed out as infamous, will have the effect of infamy. Impriſonment is a uſual preparatory ſtep to trial; and is alſo adopted as a puniſhment for certain crimes, on conviction thereof; but impriſonment, inflicted as a puniſhment, is not according to the principles of wiſe legiſlation. It ſinks uſeful ſubjects into burdens on the community, and has always had a bad effect on their morals;

morals; nor can it communicate the benefit of example, being, in its nature, excluded from the public eye.

It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is most pernicious to society rather than that which is less.

Solemnity in punishment is requisite, for the sake of example, but let not death be drawn into lingering sufferance; detain not the excruciated soul upon the verge of eternity. There should be no such thing as vindictive justice. Public utility is the measure of human punishments, and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is lost in sympathy with the superfluous sufferings of the criminal, the example loses its efficacy, and the law its reverence. It is not the intenseness of the pain

pain that has the greateſt effect on the mind, but its continuance; for our ſenſibility is more eaſily and more powerfully affected by weak, but repeated impreſſions, than by a violent, but momentary impulſe. The power of habit is univerſal over every ſenſible being. The death of a criminal is a terrible, but a momentary ſpectacle, and therefore a leſs efficacious method of deterring others, than the continued example of a man deprived of his liberty, condemned as a beaſt of burden, to repair by his labour the injury he has done to ſociety. The execution of a criminal is, to the multitude, a ſpectacle which in ſome creates compaſſion, mixed with indignation.

The ſeverity of a puniſhment ſhould be juſt ſufficient to excite compaſſion in the ſpectators, as it is intended more for them than for the criminal. A puniſhment, to be juſt, ſhould have only that degree of ſeverity which is ſufficient to deter others.

The depravity of mankind often obliges us to ſwerve from the Moſaical law, an eye for an eye; a tooth for a tooth, &c. but let not a miſtaken zeal for the military ſervice lead us too often to take away what we cannot give.

Corporal puniſhments, which are the next capital ones to death, ſhould be ſparingly made uſe of. Puniſh not a man in the ſame manner for perhaps a few hours abſence from his quarters, as if he had been a deſerter from his country, and a violator of his ſacred promiſe; for it is not the number of laſhes, but the ſhame that muſt attend it, that conſtitutes the puniſhment. To fix a laſting, viſible ſtigma upon an offender, is contrary both to humanity and ſound policy. The wretch, finding himſelf ſubjected to continual inſult, becomes habituated to his diſgrace, and loſes all ſenſe of ſhame.

The Marquis of Beccaria concludes his eſſay on crimes and puniſhments thus: That a puniſhment

a punishment may not be an act of violence of one, or of many, against a private member of society, it should be public, immediate, and necessary, the least possible in the case given, proportioned to the crime, and determined by the laws.

Let laws be fix'd that may your rage contain,
And punish faults, with a proportion'd pain;
And do not flee him, do not shoot him through,
That only doth deserve a stroke or two.

CREECH'S HORACE.

FOR small crimes then find out adequate punishments, such as confinement, fines, double duty, &c. and by way of medium, degradation from one rank to another, or working at fortifications or other public works (I must be understood here to mean non-commissioned officers and private soldiers.) Nay, let us not shut our hearts against pardon to repenting offenders; but let death, or even corporal punishment, in whatever mode they are executed, be inflicted only for capital crimes.

SECONDLY.

SECONDLY.

Of Military Rewards.

Punishments and rewards, ſays Monticuculi, are the two great ſupports, either of the political or military world. And this doctrine ſeems not to be modern only; for thus ſays Cicero, "Solon rempublicam duabus rebus contineri dixit, *Premio et Pœna.*" Puffendorf, is of opinion, that the dread of evil operates more forcibly on the mind than the expectation of good; and therefore, that the ſanction of laws muſt conſiſt rather in penalties than rewards. But this is an hypotheſis, (for I cannot allow it any better term) that I will by no means admit of. I have really a better opinion of mankind than to believe it to be well founded.

Fruitless and endleſs would be the purſuits of a ſoldier, or indeed of any one elſe, were he liable to puniſhment, without expectation of reward. A man who has

has not hopes as well as fears, muſt very ſoon ſink into deſpondency; and more particularly a military man, who, above all others, ſhould fly from deſpair. *Nil deſperandum* ſhould be his favourite theſis.

I HAVE commented largely on the ſubject of preventing crimes, in preference to truſting to reformation by puniſhment; I have ſtill one very forcible argument to urge towards the furthering and advancing this favourite doctrine, which is to inſtitute rewards for upright and virtuous actions.

There is no joy a gen'rous mind can know,
Like that of giving virtue its reward.

SHIRLEY.

THE coin of honour is inexhauſtible, and is abundantly fruitful in the hands of a prince who diſtributes it wiſely *.

WITH

* Among the Athenians, all diſabled and wounded ſoldiers were maintained by the public; the parents

With the Romans, from whoſe renown we are naturally led to follow them as a pattern in military affairs, the encouragements of valour, and other martial virtues, were much more conſiderable than the proceedings againſt the contrary vices. The moſt conſiderable, (not to ſpeak of the promotion from one ſtation to another, or of the occaſional *donations* in money, diſtinguiſhed by this name from the largeſſes beſtowed on the common people, and termed congiaria) were firſt the *dona imperatoria*, ſuch as the *haſta pura*, a fine ſpear of wood, without any iron on it, which was beſtowed on him, who in ſome ſmall ſkirmiſh had killed an enemy engaging him hand to hand. They were reckoned very honourable gifts, and the cuſtom of our great officers carrying white rods or ſtaves, as enſigns

rents and children of thoſe who fell in battle were taken care of. If parents were killed, their children were put to ſchool at the public charge, and when they advanced to maturity were preſented with a ſuit of armour.

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of their places, is ſuppoſed to be derived from thence.

THE *Armillæ*, a ſort of bracelets; the *Torques*, golden and ſilver collars; the *Viſilla*, a ſort of banners of different colours; and many others, amongſt which we muſt not omit the *corona civica*, which was given to any ſoldier that had ſaved the life of a Roman citizen in an engagement. This was reckoned more honourable than any other crown, although compoſed of no better materials than oaken boughs. It was a particular honour conferred on the perſons who had merited this crown, that when they came into any of the public ſhows, the whole company, as well ſenate as people, ſhewed their reſpect, by riſing up when they ſaw them enter; and they took their ſeat on theſe occaſions amongſt the ſenators; being alſo excuſed from all troubleſome duties and ſervices in their own perſons, and procuring the ſame immunities for their father and grandfather by his ſide. Theſe accu-

mulated privileges appear however to be carried to too romantic a height. But far greater honours and rewards were conferred on victorious generals, ſuch as the *ſalutatio imperatoris*, the ſupplication, the ovation, and the triumph. It would be ſwerving too far from my ſubject, to enter into a minute deſcription of theſe ſeveral honours or rewards conferred on ſucceſsful heroes. Suffice it to ſay, by way of explanation, that the *ſalutatio imperatoris*, was nothing more than ſaluting the commander in chief with the title of *imperator* or emperor, on account of any remarkable ſucceſs.

The *ſupplicatio* was a ſolemn proceſſion to the temple of the Gods, to return thanks for a victory. The *ovation* and *triumph* were proceſſions made into and through the city of Rome, by a conqueror, with this difference chiefly, that the *triumph* was more ſolemn and ſplendid than the *ovation*. All, to be ſure, matters of inſignificancy in the great

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ſcale of philoſophy; and yet, do we not find, in the preſent enlightened age, men of the firſt rank and abilities pleaſed with, and ſeeking after with avidity, a red, green, or blue ribbon?

If then the contagion for honorary rewards, which may be ſo eaſily complied with, ſtill rages, why refuſe them to military men?

The Romans had a peculiar mode of diſtinguiſhing their ſoldiers for long and faithful ſervices, which may be juſtly deemed a ſpecies of reward. They had always a number of ſoldiers of a more eminent degree than the commonalty, known by the name of *evocati*. They were ſuch as had ſerved out the legal time, and been diſtinguiſhed by particular marks of favour, as a reward for their valour; and it was regarded as a particular honour to be the general who received the voluntary attendance of ſuch who were invited to, and not compel-

led to ſerve. In the field, their uſual and ordinary duty was to guard the chief ſtandard, being excuſed from all the military drudgery of ſtanding on the watch, labouring on the works, or other ſervile employments. They were likewiſe indulged with the privilege of uſing the *vitis* or rod, which was the badge of a centurion's office.

THE Romans were of opinion, that good and wholeſome laws might eſtabliſh peace and unity within, but were by no means ſufficient to ſkreen a ſtate from powerful and aſpiring neighbours. The poſeſſion of a ſoldier was always held in repute, and he eſteemed as the protector and defender of his country. The eſteem of our country is of itſelf a reward far from being contemptible; and this, the Roman ſoldier, who was true to his truſt, was always ſure of; but the violent attacks that are daily made againſt a ſtanding army in Great Britain, and the frequent inſults that the ſoldiery meet with, when according to the regular and too generally

nerally received opinion, they are of no further ſervice, are diſcouragements to a military life, that nothing but the true martial and patriotic ſpirit of a Briton could get over. The bad uſes that have been made of armies, at particular periods, have created, in ſome weak minds, an ill-founded jealouſy; and the miſconduct and irregularities of individuals have been often the cauſe of the whole body being condemned. The miſerable wretches who are often admitted to bear arms, by the preſent mode of raiſing recruits in England, are frequently guilty of crimes that bring diſgrace upon the profeſſion; but this inconveniency might eaſily be removed by a different mode of forming our armies.

In the former edition of this work, I offered to the conſideration of my readers, and particularly thoſe in power, the propriety of one or more regiments of horſe or foot bearing the name of ſome particular county (as the regiments of militia do) inſtead

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of being diſtinguiſhed by the name of their colonels, and the regiments being recruited from the county whoſe name they bore, where the civil magiſtrates ſhould be obliged to aſſiſt in completing the corps; and I am happy to find that the idea has in ſome meaſure been adopted and put in practice; it may, we may hope, be improved upon, and rendered more extenſive. There is every reaſon to ſuppoſe that it will create an emulation among the counties, which ſhall produce the beſt regiments; and inſtead of the refuſe of mankind, the army will be compoſed of at leaſt an equal ſhare of good men, with other trades and profeſſions. Beſides, each individual will be more attached, and conſequently more intereſted for the honour of the regiment of Kent or Surry, than that of Colonel A. which to-morrow may be Colonel B's. An attachment to thoſe with whom we are particularly connected, or bear relation to, the Romans were well aware of, as is evident from their forming their troops into

legions, inftead of diftinct regiments. Bodies of fuch magnitude were linked together by the ftrongeft military ties, and nearly interefted in each other's prefervation.

By this mode of recruiting, our armies will confift of a fet of men, more likely to merit rewards than punifhments; and as the examples of our fuperiors are apt to be prevalent, we fhould be careful in the choice of our officers. It is a juft obfervation, that there is feldom a rule without exceptions; but we fhall generally find thofe who have had the advantage of a good education, are moft likely to be poffeffed of the virtues and qualifications neceffary in an officer who is to be an ornament to his profeffion. The want of proper heads generally caufes the ruin of corps: if officers become guilty of vices and irregularities, the foldier, as Folard obferves, will contemn rather than obey them: difobedience is the confequence of contempt, and mutiny that of difobedience.

But to return from this digression to the subject of rewards.

It may perhaps be impossible in a large and numerous army to distribute either punishments or rewards, strictly proportionable to the merit or demerit of every action; but when partiality becomes too conspicuous in those who are empowered to dispose of rewards, and they are bestowed on the least deserving, whilst those of real merit are disregarded, they are more likely to create jealousy than emulation; but on the contrary, when pure and uniform justice is to be the sole dispenser thereof, nothing can be more encouraging to both officers and soldiers, than the smallest trifle obtained as a token of their services. Ambition is the ruling passion of a soldier; it is that which prompts him to waste his youth, and impair his health; every prudent chief will then strive to excite it, when perhaps, even a smile or other small mark of approbation, will gain the end; for rewards are not considered according

according to the intrinſic value of what may be given as ſuch. The bare thanks of a monarch or a general, are of greater value to a truly noble and patriotic ſoldier, than the greateſt pecuniary rewards that can be heaped on him.

THE *corona civica* to a Roman ſoldier, who had ſaved the live of a citizen in an engagement, was accounted, as was before obſerved, more honourable than any other, though compoſed of no better materials than oaken boughs.

I WOULD not however have the reader to imagine, that I am entirely averſe from pecuniary rewards.

THE profeſſion of a ſoldier, it is well known, is not a lucrative one; and I cannot ſee any impropriety of blending honour and profit together.

THE

The English are a generous, and when actuated by a just cause, have shewn themselves to be a warlike nation; it therefore becomes the more unaccountable, that they are not more attentive to the rewarding of their officers and soldiers. The order of the Bath is accounted a military order, and is often bestowed on general officers, but few or none of inferior rank are admitted to this honour, although many a one who has not the least pretensions to the name of a soldier is indulged with it.

" Who never set a squadron in the field,
" Nor the division of a battle knows
" More than a spinster."

SHAKESPEARE'S OTHELLO.

This, therefore, if it may even be termed a military reward, must be acknowledged to be a very limited one. And as to the rewards of the inferior classes of the soldiery, it is too notorious that there are many who enjoy the emoluments of Chelsea, who never faced an enemy, whilst those who have expended

their

their youth, and loſt their limbs in the ſervice, are deprived of them.

It is much to be wiſhed that a military order was eſtabliſhed for officers in general, a cuſtom approaching almoſt to uniformity in every kingdom, (our own excepted) nay in every petty ſovereign ſtate throughout Europe. I would not indeed have even the common ſoldier deprived of this badge of honour, if he merits it. His low ſtation is rather a ſpur to his ambition, and a ſmall mark of favour from his general is often as highly valued by him, as it can be by his ſuperiors. We read of a ſoldier in Scipio's army, who having done ſeveral gallant actions, ſo as to deſerve a reward, Scipio gave him a ſum of money, exhorting him to perſevere in his valour; but he, with a ſad countenance, laid down the gold at Scipio's feet, demanding of him an honourable enſign of victory, in lieu of the gold, preferring glory before gain. Why then may we not expect to find men poſſeſſed of the ſame noble

noble ſentiment in even the loweſt ſtations of a Britiſh army. Earl Percy, ſome years ago, eſtabliſhed an order of merit amongſt the non-commiſſioned officers and private men of the 5th regiment of foot, to which no other claims were valid, but thoſe of long and faithful ſervices, or ſome remarkable inſtance of valour, or other military virtues. The good effects of this inſtitution ſhew themſelves moſt conſpicuouſly in this regiment, and would ſhine forth with greater ſplendour, was it extended throughout the whole army, and at the ſame time never ſwerving from its native purity.

However, as I before obſerved, ſince advance of honour, and increaſe of wealth, are not incompatible, why may not penſions, grants of conquered lands, &c. be attendant on the croſs, ſtar, medal, or other badge of honour, peculiar to the military order, in a proper proportion to the time of ſervice, or mark of valour, of the perſon to be rewarded? This would not only be an encouragement

encouragement to thoſe already in the ſervice, but a ſtrong incitement to others, who, although poſſeſſed with a deſire to ſerve their country, are diſcouraged from it by the injuſtice they are liable to whilſt in the ſervice, and the ſmall reward (if any) they may afterwards expect.

The Romans rewarded their ſoldiers and citizens (characters with them united in one and the ſame perſon) with grants of conquered lands; but an unequal diſtribution thereof was one cauſe, amongſt many, that firſt ſtaggered the empire. Long did they ſtruggle for an *aggrarian law* to remedy this evil, regarding it as the bulwark of the ſtate. But a diſtribution of lands was not the only reward and inducement to a military life.

The profeſſion of a ſoldier among the Romans was not as with us, a ſlavery for life, attended with infinite fatigue, and ſcarcely any profit. At the cloſe of a campaign the ſoldiers

ſoldiers were diſmiſſed, every one to his own home, to look after his domeſtic affairs, and cultivate his inheritance.

GREATER encouragements ſtill had the ſoldiery to face the dangers of the ſervice; the high honours to which their profeſſion paved the way, made difficulties vaniſh and diſappear. Innumerable rewards and diſtinctions were invented, ſuited to the different ſtations of men, and the ſeveral kinds of valour, in which they might render themſelves conſpicuous. Magiſtracies and dignities were almoſt always conferred, according to the reputation of the candidate, for bravery in war. And at the ſame time that military merit never failed to promote the perſon in whom it was lodged, no one was capable of civil employment in the commonwealth, who had not ſerved in the army, at leaſt ten years.

A GRANT of certain portions of lands, in America, was given on the concluſion of the

the peace of 1763, to fuch officers and foldiers, as had ferved, during the war, on that continent, and were reduced to half pay, and to non-commiffioned officers and foldiers, who had alfo ferved there, and had been difbanded; but the want of method in arranging thefe matters, rendered this bounty of very little fervice to thofe for whom it was intended; and the partiality of confining it to thofe only who had been employed in the weftern hemifphere, tended to raife jealoufies among thofe who had equally ferved their country in other parts of the globe.

Towns taken are never now given up to plunder, as was formerly the practice among the ancients, by which the conquerors were not only enriched, but it often ferved to aggrandize their pofterity; but at prefent, countries expofed to pillage redeem themfelves by contribution, no part of which comes into the hands of the officers or men.

Thus,

THUS, the miseries of hunger, heat, and cold, the certainty of blows, and the uncertainty of reward, are inseparable from a military life.

I WOULD not wish to incur the censure of drawing invidious comparisons, but for a moment let us throw a veil over the military manners and customs of Rome and other ancient nations, as well as those of modern repute, and coming nearer home, take a review of the advantages accruing, and emoluments acquired by the officers and private men of the navy, in proportion to those of the army. I have already delineated the hopes and expectations of both officers and soldiers of the army; those of the navy, comparatively speaking, would form a moderate sized volume. Suffice it then barely to observe on what is notoriously known, that one fortunate capture will enrich a captain of a man of war, and his crew, for ever, but what has the military officer or soldier, who has endured the fatigue

tigue and danger of many a well-fought battle, and perhaps loſs of limb, to gild the bitter pill of adverſity, but the reflection that his misfortunes, as far as affect himſelf, flow not from fault, but miſadventure. A heartfelt ſatisfaction, though but cold comfort.

THE Romans, though ſo ready to reward their officers and ſoldiers with lands, did it warily, with reſpect to the magnitude of the reward. God forbid, ſaid Curius, that any man ſhould look upon that as a ſmall piece of land which is ſufficient to maintain him. Monteſquieu, who reaſons on general principles, obſerves, that great rewards in both monarchies and republics are a ſign of their decline, becauſe they are a proof of their principles being corrupted; and that the idea of honour has no longer that ſame force in a monarchy, nor the title of a citizen the ſame weight in a republic. And in reaſoning on theſe general principles, he terms England a republic diſguiſed under the form

of

of monarchy; and obſerves, that in deſpotic governments people have a greater dread of death, than regret for the loſs of life, conſequently their puniſhments ought to be more ſevere. In moderate ſtates they are more afraid of loſing their lives than apprehenſive of the pain of dying: puniſhments therefore which deprive them ſimply of life, are ſufficient; and in deſpotic governments the prevailing principle is terror; in a monarchy or republic, the ſpring of men's actions is honour or virtue.

It would be a great abuſe to condemn to the ſame puniſhment, obſerves that favourite author, (Monteſquieu) a perſon that only robs on the high way, and another who robs and murders; and on the ſame parity of reaſoning, one who ſimply neglects his military duties for a time, and another who abandons his colours entirely, and perhaps joins your enemy, and oppoſes you in the field.

To

To draw then some general conclusions from what has been said, both with regard to military punishments and rewards, as far as they appear consonant to the British constitution. Martial law, says Lord Chief Justice Hale, is no law at all, but merely indulged and regarded as an excrescence; however, this excrescence has not only been admitted, but encouraged by the legislature, year after year, since a standing army in Great Britain has been judged necessary for the preservation of the balance of power in Europe. And military discipline, as M. Saxe expresses it, has been found to be the soul of armies. But at the same time that we are sanguine in our own wishes for the good of his majesty's service, let us not forget that every soldier is a human creature, susceptible of the same feelings and passions with other men, and as such, every method should previously be taken to deter him from vice, rather than trust to a reformation by punishment. That punishments must

sometimes

ſometimes be inflicted, is moſt certain; in ſuch inſtances let it be exemplary, for the ſake of the multitude; but let there be ever ſhown a greater deſire to *reward* than to puniſh.

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THE END.